TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. ~~1102~~. 121

THE EAST LAKE LAND COMPANY, PLAINTIFF IN ERROR,

vs.

ISAIAH C. BROWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

FILED APRIL 4, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 3, 1891.

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1 *Summons.*

City Court of Birmingham, July Term, 1887.

THE STATE OF ALABAMA, }
Jefferson County. }

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon Isaac C. Brown to appear before the city court of Birmingham in and for said county, at the place of holding the same, within thirty days from the service of this summons and complaint, then and there to answer, plead, or demur to the complaint hereto annexed of the East Lake Land Company, a corporation under the laws of the State of Alabama. You are required to execute this process instanter and to return the same immediately upon the execution thereof.

Witness my hand this 20 day of Sept., 1887.

FRANK M. IRION,
Clerk and Register.

Complaint.

EAST LAKE LAND COMPANY, a Corporation under the Laws of the State of Alabama, Plaintiff,
vs.
ISAAC C. BROWN, Defendant.

The plaintiff sues to recover the following tract of land, the north half of the southwest quarter of section fourteen (14), township seventeen (17), range two (2) west, in Jefferson county, Alabama, of which it was possessed before the commencement of this suit, and after such possession accrued the defendant entered thereupon and unlawfully withholds and detains the same, together with one thousand dollars for the detention thereof.

HEWITT, WALKER & PORTER,
Plaintiff's Attorney-.

Filed this 19th day of Sept., 1887.

F. M. IRION,
Clerk and Register.

Sheriff's Return.

Received this 20 day of Sept., 1887.

S. R. TRUSS, *Sheriff.*

Executed this 26 day of Sep., 1887, by leaving a copy of the within summons and complaint with Isaac C. Brown, defendant.

S. R. TRUSS, *Sheriff,*
By J. C. W., *D. S.*

2 *Plea of Defendant.*

The defendant, for answer to the plaintiffs' said complaint, says that he is not guilty of the matters therein alleged.

WEBB & TILLMAN AND
D. B. BESTOR,
Attorneys for Defendant.

Defendant demands trial by jury.

WEBB & TILLMAN, *Att'ys.*

Filed this 10th day of Oct., 1887.

F. M. IRION,
Clerk and Register.

Petition for Removal of Cause.

In the City Court of Birmingham, Alabama.

EAST LAKE LAND COMPANY, a Body Corporate under the Laws of Alabama, Plaintiff,
vs.
ISAAC BROWN.

Petition for transfer of suit to Federal court.

To the honorable the city court of Birmingham, Alabama:

Your petitioner, Isaac C. Brown, respectfully shows that he is defendant in the foregoing-entitled suit, and that the same was by the East Lake Land Co., a body corporate under the laws of Alabama, commenced on or about the 20th day of September, 1887, in said city court; that your petitioner was at the time of bringing said suit and still is a citizen of the State of Alabama, and resident thereof.

Your petitioner further shows that there is and was at the time said suit was brought a controversy therein between your petitioner and the said plaintiff, the East Lake Land Company, which is a body corporate under the laws of Alabama, and as such who is citizen of the State of Alabama and resident thereof; that said action was brought by the said East Lake Land Company for the purpose of recovering from petitioner the possession of the N. ½ of the S. W. ¼ of section 14, township 17, of range 2 west, in Jefferson county, Ala., of which land petitioner was at the beginning of said suit and is now seized and possessed, and that petitioner's right and title to said land is as a homestead entered by him under the homestead laws of the United States, and for which petitioner holds a certificate of entry under said statutes, and that petitioner's title and right to said lands arise under the laws of the United States, and that the matter in dispute in this suit exceeds the sum of two thousand dollars, exclusive of costs. Your petitioner further represents that

this suit has not been tried, but is now pending for trial in
3 the said city court of Birmingham, Ala., and that your petitioner desires to remove the same into the circuit court of the United States for the southern division of the northern district of Alabama, in pursuance of the acts of Congress in that behalf provided, to wit, the act approved March 3rd, 1887.

Your petitioner further says that he offers herewith a bond executed by himself, I. C. Brown, and W. E. Brown, of Birmingham, Ala., as surety, in the penal sum of two hundred and fifty dollars, conditioned by said act of Congress required.

Your petitioner therefore prays that the said bond may be accepted as good and sufficient according to the act of Congress, and that the said suit may be removed into the next circuit court of the United States in and for said southern division of the northern district of Alabama, pursuant to the aforesaid act of Congress in such case made and provided, and that no further proceedings may be had therein in this court; and your petitioner will ever pray, etc.

WEBB & TILLMAN,
Attorney for Defendant.

Filed the 25 day of Oct., 1887.

F. M. IRION,
Clerk & Reg.

Bond for Removal of Cause.

Know all men by these presents that we, Isaac C. Brown, as principal, and W. E. Brown, *and* of Birmingham, Ala., as sure*ties*, are hereby held and firmly bound unto the East Lake Land Company in the penal sum of two hundred and fifty dollars, lawful money of the United States; for the payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The conditions of this obligation is such that if Isaac C. Brown shall enter and file or cause to be entered and filed in the next circuit — of the United States in and for the southern division of the northern district of Alabama, on the first day of its session, copies of the record and all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the city court of Birmingham, Alabama, in which the East Lake Land Company is plaintiff and Isaac C. Brown is defendant, and shall do such other acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States — court, then this obligation to be void; otherwise of force.

4 Witness our hands and seals this 25th day of October, 1887.

I. C. BROWN, [L. S.]
By W. E. BROWN.
W. E. BROWN. [L. S.]

STATE OF ALABAMA, }
County of Jefferson. }

I, W. E. Brown, of said county, the surety named in the foregoing bond, being duly sworn do depose and say that I am a resident of the State of Alabama and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Alabama liable to execution of the value of more than five hundred dollars.

W. E. BROWN.

Subscribed in my presence by W. E. Brown and by him sworn before me this 25 day of October, A. D. 1887.

F. M. IRION,
Clerk & Register.

EAST LAKE LAND CO. }
vs.
ISAAC C. BROWN. }

Upon hearing the application for removal of this cause to the United States circuit court therein mentioned, it being made to appear that the foregoing bond is sufficient and the said application regular, it is ordered that the said bond be, & it — hereby, approved and this said application granted.

H. SHARPE,
Judge of the City Court of Birmingham.

December 1st, 1887.
Filed the 25 day of Oct., 1887.

F. M. IRION, *Clerk.*

Judgment.

This cause coming on to be heard on the 1st day of December, 1887, upon the petition filed by the defendant for its removal to the circuit court of the United States for the southern division of the northern district of Alabama, and the plaintiff's counsel having notice of said petition and being present in open court, making no objection, but consenting thereto, and the defendant having filed with his said petition a bond with security as required by law, and upon the hearing of said application and consideration thereof,
5 it being made to appear to the satisfaction of the court that the said petition and the said bond are in conformity with the statute — States providing for the removal of causes from State courts to the courts of the United States, and that said petition shows sufficient ground for such removal and presents a cause within the jurisdiction of the said circuit court of the United States; and it further appearing that the said bond is sufficient in amount and sufficiently secured, it is ordered that said bond be, and the same is hereby, approved, and that said application be granted, and that said cause be, and it is hereby, ordered to be removed into the circuit court of the United States for the southern division of the

northern district of Alabama, and that the clerk and register do make a full and complete transcript of the record proceedings and papers in said cause, which shall be filed in said circuit court on or before the first day of the next term thereof.

Certificate.

THE STATE OF ALABAMA, }
Jefferson County. }

I, Nathan L. Miller, clerk & register of the city court of Birmingham in and for said county and State, do hereby certify that in the cause East Lake Land Co. *vs.* I. C. Brown, which was removed from said city court to the circuit court of the United States for the southern division of the northern district of Alabama, the foregoing pages, numbered from 1 to 8, inclusive, contain a full, true, & complete transcript of the record and proceedings in said cause.

Given under my hand and seal of the court this the 13 day of ——, 1888.

NATHAN L. MILLER,
Clerk and Register.

Endorsed: 91. East Lake Land Company *vs.* Isaac C. Brown. Transcript. Filed in clerk's office this 13th day of Feb'y, A. D. 1888. A. W. McCullough, clerk.

6

EAST LAKE LAND COMPANY }
vs.
ISAIAH C. BROWN. }

The defendant in the above-stated cause, for further answer and defense to said suit, says that on, to wit, the 23rd day of April, 1887, this defendant made an entry of the lands sued for in this action as a homestead under the homestead laws of the United States, said entry numbered 19700, and entered and took possession of said lands under said entry; and th reafter, on the 26th day of November, 1887, the said plaintiff filed in the office of the Commissioner of the General Land Office of the United States, in the Department of the Interior at Washington, D. C., a petition invoking the jurisdiction of the said Commissioner and praying for the cancellation of this defendant's said entry numbered 19700 upon the ground and for the reason that the said land on the 12th day of October, 1821, had been entered by Thomas Horne, and that after said entry had been made a patent had been issued to the said Horne; and that after the issue of the said patent the Secretary of the Treasury, in whose department the Land Office was at that time, had no power or jurisdiction to cancel said patent so as to reinvest the legal title of said lands in the United States Government; and the defendant avers and states that the said Commissioner of the General Land Office of the United States was a court of competent jurisdiction under the statute laws of the United States to hear and determine and to decide the issues presented by said application; and that the said land

involved in said application is the identical land involved in this suit, and that the controversy was between the same parties, to wit, between this defendant and the said East Lake Land Company, and involved the title of the United States Government to the said land and its right to allow its entry as a homestead by this defendant; and the defendant avers that afterwards, on, to wit, the 19th day of December, 1887, the Honorable S. M. Stockslager, acting Commissioner of the General Land Office of the United States, rendered his decision on the said application of the said East Lake Land Company adversely to the said petition upon the facts of the same as presented thereby and declined to disturb the homestead entry numbered 19700 so made by the said Brown. Wherefore this defendant pleads and says that the matters and issues involved in this suit as to his title to said land have already been adjudicated
7 and determined adversely to the plaintiff in this suit, and said defendant pleads said adjudication as an answer in full and a bar to plaintiff's suit.

WEBB & TILLMAN, AND
D. P. BESTOR,
Att'ys for Def't, I. C. Brown.

Sworn to & subscribed by I. C. Brown before me this 14th day of Dec'r, A. D. 1888.

A. W. McCULLOUGH, *Clerk.*

Endorsed: No. 91. The East Lake Land Co. *vs.* Isiah C. Brown. In U. S. circuit court for sou. div. of nor. dist. of Ala. Plea of *res adjudicata*. Filed in clerk's office this 15 day of March, A. D. 1888. A. W. McCullough, clerk. Webb & Tillman & D. B. Bestor, att'ys for defendant. Refiled this 13th day of Sept., A. D. 1889. A. W. McCullough, clerk.

8 THE UNITED STATES OF AMERICA, }
Northern District of Alabama, Southern Division. }

Be it remembered that heretofore, to wit, on the 15th day of March, A. D. 1888, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the first Monday of March, A. D. 1888, and of the Independence of the United States of America the one hundred and 12th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

EAST LAKE LAND COMPANY }
vs. }
ISAAC C. BROWN. }

Come the parties, by their attorneys; and, on motion of plaintiff's counsel, it is ordered by the court that this cause be continued.

9 THE UNITED STATES OF AMERICA, }
Northern District of Alabama, Southern Division. }

Be it remembered that heretofore, to wit, on the 15th day of December, A. D. 1888, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the first Monday of September, A. D. 1888, and of the Independence of the United States of America the one hundred and 13th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

EAST LAKE LAND CO. }
vs.
ISAIAH C. BROWN. }

Come the parties, by their attorneys; and, on motion and for cause shown, it is ordered by the court that this cause be continued.

10 In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

THE EAST LAKE LAND COMPANY }
vs.
ISAIAH C. BROWN. }

The plaintiff demurs to the plea of *res adjudicata* filed by defendant in this cause in the court on the 15th day of March, 1888, and for cause of demurrer thereto sets down and assigns the following, viz:

1st. This is an action of ejectment, and the only question mooted is whether or not the title is in plaintiff; if so, the Department of the Interior had no jurisdiction or power under the law to adjudicate the same.

2nd. The refusal of the Department of the Interior upon the application of the plaintiff to set aside the homestead entry of defendant is no defense to this action of ejectment. If the title to the land in controversy had passed out of the United States and vested in Horne the Interior Department had no jurisdiction, which fact is a judicial question, and can only be finally settled in the courts of the country.

3rd. This action was commenced on the 20th day of September, 1887, and said plea shows that said adjudication, which is set up as a defense to this action, did not occur until the 19th day of September, 1887, and such plea is not to the further maintenance of the suit. The matter which is a defense to this action arose since the commencement of this action, and can only be set up by a plea of *puis darrein* continuance.

4th. There is no averment of such facts in said plea as show that title to the lands sued for has been twice adjudicated against plaintiff by a court of competent jurisdiction.

5th. There is no averment of such facts as show that title to the lands in controversy was adjudged by said Interior Department to be in the United States or in defendant.

6th. There is no allegation in said plea of any facts which show that said Department of the Interior passed upon the question at issue between the plaintiff and defendant—that is, whether or not the plaintiff had a superior title to said land in controversy in a court of law to that of the defendant.

11 7th. It does not appear from any facts alleged in said plea but that the decision of the Department of the Interior was based upon the equities of the parties and not upon the legal title to the land.

8th. It is not averred in said plea that the identical question which is presented by the complaint in this cause was adjudicated by the Department of the Interior adversely to the plaintiff.

9th. The question presented by the complaint in this case is purely a judicial question, of which the Department of Interior has no jurisdiction.

10th. There is no averment in said plea that plaintiff claims under Horne or under said alleged cancelled patent.

11. The Department of the Interior had jurisdiction to set aside the homestead entry of defendant, but it had no right to adjudge whether or not the Horne patent had been properly cancelled so as to preclude this court from inquiry into the question as to whether or not said patent had been legally cancelled.

12th. The said plea does not set out the record of the matters and things alleged to have been decided by said Commissioner of the General Land Office with sufficient certainty.

13th. Because said plea fails to show that the cause of action for which this suit was brought was or could have been tried in said first suit before the said Commissioner.

14th. Because it is not shown by said plea that the cause of action in said former suit before said Commissioner was the same as that of which a recovery is sought in this suit.

15th. Because it is not shown that the recovery sought in this action was or could have been adjudicated in said former suit before said Commissioner.

16th. Because it is not shown by said plea that the merits of this action were or could have been tried in said former action before the said Commissioner.

17th. Because said pleas do not show with sufficient certainty the issue decided in the former suit before said Commissioner.

18th. Because said Commissioner has no power or jurisdiction to decide an action of ejectment or to settle two conflicting titles.

19th. Because — is not averred in said plea that no appeal has been or was taken from said decision of said Commissioner

12 within the time allowed by law for such appeal to the Secretary of the Interior.

20th. Because such facts as show that the said decision of said Commissioner was final and conclusive are not stated or averred in said plea.

HEWITT, WALKER & PORTER,
Att'ys for Plaintiff.

Endorsed: No. 91. East Lake Land Co. *vs.* Isaac C. Brown. Demurrer. Filed in clerk's office this 7 day of Sept., A. D. 1889. A. W. McCullough, clerk.

13 In the United States Circuit Court at Birmingham.

EAST LAKE LAND CO.
vs.
ISAIAH C. BROWN.

And now comes the defendant Isaiah C. Brown, and, for a further plea in this cause for a *puis dar-ien* continuance, says that on, to wit, the 26th day of November, 1887, the said plaintiff, The East Lake Land Company, chose and elected to litigate with the said defendant the right of the defendant as the entryman of a homestead to possess and occupy the said land involved in this action before the Commissioner of the General Land Office of the United States, in the Department of the Interior, at Washington, D. C., and to that end and for that purpose invoked the jurisdiction of the said department for the determination and decision of the facts set forth in his said petition and in the said defendant's answer thereto, hereinafter stated and set forth in this plea by the filing of its petition to the said Commissioner against Isaiah C. Brown, and the defendant avers that in its said petition the said plaintiff alleged, among other things, that at the time of the entry of the lands sued for in this action by the said Brown, to wit, on the 23rd day of April, 1887, it was not public land and was not subject to homestead entry, for that he averred on the 12th day of October, 1821, one Thomas Horne had entered said land in the land office at Tuscaloosa, Alabama, and that thereafter, on the 9th day of July, 1823, a patent was issued to said Horne conveying said land to him, and defendant avers that he, the said Isaiah C. Brown, who is the identical person sued in this action and who was made defendant in said petition, filed his answer to said petition, wherein he averred as a fact that after the entry of the said land by the said Horne, to wit, the southwest quarter of section fourteen, which includes the identical land sued for in this action, he, the said Horne, ascertained that he had made a mistake in the numbers of the land which he had intended to enter by reason of mistakes or alterations made in the surveyor's marks at the corner of said section, and that the said Horne made affidavit of said facts on the 10th day of November, 1821, and applied through the local land office at Tuscaloosa to the said Commissioner to be allowed to recall said application to enter said land, and, further, that thereafter, upon investigation, the application of said

Horne, supported by the opinion of the register and receiver of
14 the land office at Tuscaloosa, Alabama, was approved and granted by the Secretary of the Treasury, who then had control, under the laws of the United States, of said department, and who, on the 18th day of April, 1823, addressed a communication to the Commissioner of the General Land Office at Washington, authorizing him to direct the local land office at Tuscaloosa to permit said Horne to withdraw his said entry for the southwest quarter of section fourteen in accordance with the statutes in such cases provided; and said defendant in his said answer to said petition further averred that by some mistake or inadvertence, after the granting of said petition to said Horne to withdraw his said entry, on, to wit, the 9th day of July, 1823, a patent was issued from the department of the Land Office at Washington, and sent to the local land office at Tuscaloosa, to said Horne for said land, but that said Horne never had received or accepted said patent, and that said Horne had, in pursuance of the authority so given him, withdrawn his said entry, and that the money paid for said entry was applied to the entry of other Government lands.

And the defendant further says that the said Commissioner of the General Land Office at Washington, acting upon said petition of the said East Lake Land Company, undertook the investigation and determination of the facts set forth in said petition and said answer, and that the said Commissioner was a court of competent jurisdiction, created by the laws of the United States, to ascertain, hear, and determine upon the facts so presented to him; and that he thereafter, on, to wit, the 19th day of December, 1887, decided the facts set forth in said defendantr's said answer to be true as therein stated and set forth, and found said issue of facts in favor of this defendant and rendered his decision in writing to that effect, which decision, upon application for a review, he affirmed by a subsequent decision of April 7th, 1888; and that thereafter the said East Lake Land Company appealed from the decision of the said Commissioner to the Secretary of the Interior, which said Secretary, under the land laws of the United States, had jurisdiction to hear and entertain said appeal; and that said Secretary, upon the consideration of said appeal, on, to wit, the 29th day of August, 1889, reaffirmed the finding of the said Commissioner upon the facts in said case, and refused to set aside but affirmed the validity of the entry of the said land of the said Brown and confirmed this defendant in his right to occupy and possess said land by reason of his said entry.

Wherefore the defendant says that the matters and issues
15 involved in this action have been heretofore adjudicated and determined between the plaintiff and the defendant and are *res adjudicata*.

D. P. BESTOR & WEBB & TILLMAN,
Att'ys for Def't, I. C. Brown.

Subscribed and sworn to before me this 13 day of September, A. D. 1889.

A. W. McCULLOUGH, *Clerk.*

Endorsed: No. 91. East Lake Land Company *vs.* Isaiah C. Brown. Plea of def't. Filed this 13th day of Sept., A. D. 1889. A. W. McCullough, clerk.

16 EAST LAKE LAND COMPANY
vs.
I. C. BROWN.

The plaintiff demurs to the plea of *puis dar-ien* continuance filed in this court on the 13 day of September, 1889, and sets down and assigns the same causes of demurrer as are set down and assigned to the plea of *res adjudicata* heretofore filed in this cause, viz: Causes of demurrer Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, and 18, and in addition thereto the following, viz: 1. It is not shown with sufficient certainty the grounds of the decision of said Commissioner of the General Land Office and of the Secretary of the Interior. It does not appear from said plea but that the decision was based upon the equitable title of the United States or upon the ground that the parties should be remitted to their remedies in the courts, or that the department had no jurisdiction of the cause.

2. There is a failure to set out the pleadings in said cause before the said Commissioner and the Secretary of the Interior.

3. The facts alleged in said plea show that said Interior Department had no authority or jurisdiction to finally settle the question.

4. The only question involved in this cause is as to whether or not the plaintiff has a title to the land in controversy, which question neither the said Commissioner of the General Land Office or the Secretary of the Interior, or both, had any jurisdiction to settle or adjudicate.

5. There is no power conferred upon the Interior Department or the Commissioner of the General Land Office or the Secretary of the Interior, or any executive officer of the Government of the United States, to adjudicate a question of conflicting title to land or to try a case of ejectment.

6. The question of whether or not the title has passed out of the Government of the United States is a judicial question and can only be finally and conclusively settled by the courts.

7. Neither the Department of the Interior nor the Commissioner of the General Land Office nor the Secretary of the Interior can by any action nor decision preclude the courts from inquiring into the question of the power of said department or such officer to cancel a patent when issued and recorded.

17 8. The plea shows that plaintiff claims under a patent issued to one Thomas Horne by the United States. The Department of the Interior, Commissioner of the General Land Office, or the Secretary of the Interior has no power to decide upon the legality of a patent which had been issued by the United States so as to preclude the courts from inquiring into and deciding the legality of such patent.

HEWITT, WALKER AND PORTER,
Att'ys for Defendant (?).

Endorsed: East Lake Land Co. *vs.* I. C. Brown. Filed Sept. 23rd, 1889. A. W. McCullough, clerk.

18 In the Circuit Court of the United States for the Southern Division of the Northern District of the State of Alabama.

EAST LAKE LAND CO.
vs.
ISAIAH C. BROWN.

And now comes the defendant, Isaiah C. Brown, and, for a further plea in this cause *puis dar-ien* continuance, says that on, to wit, the 29th day of August, 1889, the honorable Secretary of the Interior rendered his decision on an appeal to him in the cause of the East Lake Land Company *vs.* said Isaiah C. Brown adversely to the plaintiff in this cause, and finally adjudicated and settled the matters in dispute and controversy in this cause in favor of the defendant and against the plaintiff. This defendant made an entry of the lands sued for in this action now pending before this honorable court on, to wit, the 23rd day of April, 1887, under the homestead laws of the United States, numbered 19700, and entered under and took possession of said lands under said entry. On, to wit, the 26th day of November, 1887, the East Lake Land Company, the plaintiff in this cause, chose and elected to litigate its rights to said land before the Land Department of the United States, and on said day filed in the office of the Commissioner of the General Land Office of the United States, in the Department of the Interior, at Washington, D. C., a petition invoking the jurisdiction of said department in the adjustment of its said rights with the defendant in this cause and praying for the cancellation of this defendant's said entry No. 19700 upon the ground that one Thomas Horne had previously to the entry of this defendant made entry and received a patent for the same identical lands as are sued for in this action, and that plaintiff held by mesne conveyances under said Horne. The defendant further avers that said Land Department was a court of competent jurisdiction, under the statutes and laws of the United States, to hear, determine, and decide the issues presented by said application, and that said Department of the Interior did take jurisdiction of said cause on the application and petition of said plaintiff and did adjudicate, settle, and determine all questions between the plaintiff and defendant involved in this suit as follows: On the 19th day of December, 1887, the Commissioner of the General Land Office, who had jurisdiction of said case as aforesaid, decided in favor of and sustained the homestead entry of said defendant and declared said land involved in this suit now before this honorable circuit
19 court to belong to the United States and open to said homestead entry. On February 4th, 1888, the plaintiff applied for and obtained a review and rehearing of said cause before the said Commissioner of said General Land Office, and on the 7th day of April, 1888, said Commissioner then affirmed his former decision and again decided in favor of this defendant and sustained his said

homestead entry, as he had previously done. Whereupon, on or about the 4th day of June, 1888, an appeal was taken by the plaintiff in this cause to the honorable Secretary of the Interior of the United States to reverse and set aside said rulings and decisions of said Commissioner of the General Land Office as aforesaid; and, after a careful examination of the issues involved in this cause between said plaintiff and said defendant in this cause, said Secretary of the Interior, on, to wit, the 29th day of August, 1889, affirmed said decision of said Commissioner of the General Land Office as aforesaid.

And this defendant further avers that said application made to said Land Department by the plaintiff in this suit and which was acted upon and adjudicated by said department as aforesaid related to and embraced the identical land involved in this suit now before this honorable circuit court, and that the controversy there and here was and is between the same persons and parties, to wit, The East Lake Land Company, as petitioner, who is the plaintiff in this suit, and Isaiah C. Brown, this defendant, and that the issue tried and settled there is the same as the one proposed to be again tried and settled here in this court, to wit, all the facts in said cause, and the decision of such facts showing the rights of the United States Government to said land involved in this suit and its right to allow this defendant to make homestead entry of said land and occupy it as such.

Wherefore this defendant now pleads and says that since the last continuance of this cause all the matters and issues involved in this suit and the facts relating thereto upon which the defendant's rights to the possession of said lands rest have already been adjudicated, determined, and settled by the honorable Secretary of the Interior of the United States, who had the right and authority so to do, as aforesaid, adversely to the plaintiff in this suit; wherefore this defendant pleads said adjudication and decision of said United States Land Department as an answer in full and a complete bar to the further prosecution of plaintiff's suit in this cause.

20 OVERALL & BESTOR,
WEBB & TILLMAN,
Att'ys for Def't, I. C. Brown.

Sworn to and subscribed before me this 12 day of Sept., A. D. 1889.

A. W. McCULLOUGH, *Clerk.*

Endorsed: East Lake Land Co. *vs.* Isaiah C. Brown. Additional special pleas. Filed Sept. 23rd, 1889. A. W. McCullough, clerk.

21 THE UNITED STATES OF AMERICA, }
Northern District of Alabama, Southern Division. }

Be it remembered that heretofore, to wit, on the 23rd day of September, A. D. 1889, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district,

on the first Monday of September, A. D. 1889, and of the Independence of the United States of America the one hundred and 14th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

EAST LAKE LAND CO.
vs.
ISAIAH C. BROWN.

Come the parties, by their attorneys, and, on motion of plaintiff's counsel and for good cause shown, it is ordered by the court that this cause be continued.

22 UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 10th day of March, A. D. 1890, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the first Monday of March, A. D. 1890, and of the Independence of the United States of America the one hundred and 14th year—present, the Hon. John Bruce, judge of the district court of the Unites States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

EAST LAKE LAND CO.
vs.
ISAIAH C. BROWN.

Come the parties, by their attorneys, and, on motion of plaintiff's counsel and for good cause shown, it is ordered by the court that this cause be continued.

23 Circuit court of the United States for the Southern Division of the Northern District of Alabama.

EAST LAKE LAND COMPANY, Plaintiff,
vs.
ISAIAH F. BROWN, Defendant.

And now comes the defendant in this cause, Isaiah C. Brown, by his attorney, and says that said plaintiff ought not further to maintain his aforesaid action against him, because he says that first prior to the last continuance and before this day and after the commencement of this suit said defendant has obtained a patent from the United States Government to him of said lands to recover which this suit is brought, and that said patent was issued to him and in his name and was accepted by him and is now in his possession showing his full title to said lands, and this the said defendant is

ready to verify. Wherefore he prays judgment if said plaintiff ought further to have or mantain his aforesaid action thereof against him.

OVERALL & BESTOR,
WEBB & TILLMAN,
Att'ys for Def't.

THE STATE OF ALABAMA, }
Jefferson County. }

Personally came before me A. W. McCullough, clerk U. S. circuit court, Isaiah C. Brown, the defendant in the above cause, who, being by me duly sworn, on oath says that the above plea of *puis dar-ien* continuance is true in substance and in fact.

ISAIAH C. BROWN.

Subscribed and sworn to before me this 6 day of September, 1890.

A. W. McCULLOUGH,
Clerk U. S. Cir. Court.

Endorsed: East Lake Land Co. *vs.* I. C. Brown. Plea of *puis dar-ien* continuance. Filed as of Sept. 8th, 1890. A. W. McCullough, clerk.

24 In the Circuit Court of the United States, Southern Division, Northern District of Alabama.

EAST LAKE LAND COMPANY }
vs.
ISAIAH C. BROWN. }

The defendant, for a plea in his behalf and for answer to said complaint, says and pleads that he is not guilty of the matters and things alleged in the said plaintiff's said complaint; wherefore he prays the judgment of this court.

And the said defendant, for a rejoinder to the replication filed by the said plaintiff to the said defendant's plea in this cause, which said plea was filed on the 8th day of September, 1890, says and avers that whilst it is true, as stated in said plea, that the said Thomas Horne did make application to enter, and did, on the 12th day of October, 1821, apply to the land office of the United States at Tuscaloosa, Alabama, to enter the said southwest quarter of section No. 14, and did receive the certificate of entry No. 884, dated October 12, 1821, which is set out in said plea, yet the said defendant further avers in reference thereto the fact to be that he, the said Thomas Horne, soon after he had made said entry, to wit, on or about the 10th day of November, 1821, discovered that in making said entry he had made a mistake in the number of the section which it was his purpose and intention to enter; that it was his purpose and intention to have entered the southwest quarter of section seventeen, in township seventeen south, range two west, and

that such mistake was produced by the obliteration or change of the original marks or numbers at the corners of the said tract of land—that is, by some person altering or changing the mark or figures from 17 to 14 at the corner, and that he, the said Horne, on the said 10th day of November, 1821, made an affidavit before Hume R. Field, who was an officer authorized to administer oaths, setting forth the facts with reference to his said mistake, and filed the same, after it was so made, with the register and receiver of the land office at Tuscaloosa, Alabama, within which land district the said tract of land was situated; and that thereafter, on, to wit, November 22, 1821, the said land officers transmitted to the Commissioner of the General Land Office, in Washington, D. C., informing the said Commissioner that the said Thomas Horne desired to transfer the payment made on the said tract so entered to some other tract of land, and that thereafter, in obedience to a communication received by the officers of the said land office at Tuscaloosa, dated the second day of January, 1822, they, the said register and receiver, on, to wit, the 19th day of March, 1822, made and transmitted to the said Commissioner of the General Land Office at Washington, D. C., the written evidence submitted to them by the said Horne, together with their opinion both as to the existence of the mistake and the credibility of the persons testifying thereto; and that thereafter, under date of April 27, 1822, the said Commissioner of the said General Land Office at Washington caused said report and communication to be submitted to the Secretary of the Treasury, who was the proper officer having charge of said land department, with the following endorsement: "Respectfully submitted to the Secretary of the Treasury whether the mistake of T. Horne in entering a tract different from what he intended, owing to the change of the marks in the corners from 17 to 14, may not be rectified;" and that thereafter, on, to wit, the 18th day of April, 1823, the said Secretary of the Interior addressed a communication to the Commissioner of the General Land Office, authorizing him, the said Commissioner, by virtue of the power and authority vested in him, the said Secretary of the Treasury, under and by the act of Congress of the United States approved the third day of March, 1819, to direct the local land officers at Tuscaloosa to permit said Horne to withdraw his said entry of the southwest quarter of section fourteen, in township seventeen south, range two west, and to apply the money paid thereon to the purchase of any other public lands purchased of the United States in the district of Tuscaloosa; and that thereafter, to wit, on the 23rd day of April, 1823, a communication was sent from the Treasury Department and from the office of the Commissioner of the General Land Office in said department, addressed to the register and receiver of the land office at Tuscaloosa, enclosing a copy of the said decision and instructions so made by the said Secretary of the Treasury under date of April 18, 1823, and authorizing and directing the said local land officers to permit the said Horne to withdraw his said erroneous entry and to permit the payment so made by him to be applied to other lands accordingly; and that afterwards, to wit, on the first day of August,

1823, the said instructions were carried out and the said
26 Horne was permitted to receive and receipt for the said purchase-money, and to apply the same, and that he did then apply the same to the payment of the purchase-money for the two cash entries numbered, respectively, 3595 and 3594, which embraced the east half of the southwest quarter of section twenty-nine, in township eighteen, range six west, and the east half of the southwest quarter of section two, in township twenty, of range four west, for which said last-named lands patents were afterwards, to wit, on the 17th day of May, 1824, issued to the said Horne and received and accepted by him, and that all this was done as aforesaid in obedience to said instructions on, to wit, the first day of August, 1823.

And the defendant further says that although the said patent dated the ninth day of July, 1823, was signed and recorded, conveying to said Horne the said land, yet that it was not so recorded and sent from the General Land Office in Washington, D. C., to the local land office at Tuscaloosa, Alabama, until, to wit, the 21st day of August, 1823; that the signing and recording of said patent after the cancellation of the said Horne's said entry was done by mistake of some clerical officer in said Land Department and without the knowledge or consent of the said Horne, who never in fact received said patent or accepted the same; and that thereafter, in obedience to the instructions received by the local land officers at Tuscaloosa, the said patent was returned to the General Land Office at Washington, D. C., and cancelled because it had been so erroneously issued by mistake occurring in said General Land Office.

Wherefore the said defendant pleads and says that the legal title to said land never was divested by said patent so issued to the said Horne out of the United States Government which was so recalled and cancelled as aforesaid, but remained in the said Government of the United States until, to wit, the 8th day of March, 1890, when it was vested in this defendant, Isaiah C. Brown, by the said patent so issued to the said Brown, which is numbered 22684, and which is fully set out in the said defendant's said plea of the 8th day of September, 1890.

Wherefore the said defendant prays judgment of the court that the said plaintiff should not further have or maintain his said action.

D. P. BESTOR AND
WEBB & TILLMAN,
Attorneys for Defendant.

27 Endorsed: East Lake Land Co. *vs.* I. C. Brown. Rejoinder. No. 1. Filed Sept. 16th, 1890. A. W. McCullough, clerk.

28 United States Circuit Court.

EAST LAKE LAND COMPANY
vs.
ISAIAH C. BROWN.

The defendant now comes, by his attorney, and says in answer to

plaintiff's replication filed in this cause on the 16th day of September, 1890, and as a rejoinder thereto, as follows: Defendant says that said patent so issued to said Horne, as set forth in plaintiff's replication, was issued to him, said Horne, by mistake and without authority so to do, because defendant says that long before the issuing of said patent to said Horne he had applied to the United States Land Department to change his application for entry and have his money paid for the same applied to the entry of other lands, which was done by said United States Land Department, and said money so paid by him when he applied to enter the southwest quarter of section fourteen, township seventeen south, range two west, was duly and legally applied to the entry of the east half of the southwest quarter of section twenty-nine, township eighteen, range six west, and the east half of the southwest quarter of section two, township twenty, range four west, and that the United States Land Department permitted said Horne to withdraw his said application of entry of said southwest quarter of section fourteen, township seventeen south, range two west, and declared the same for nought, and that when said patent to said Horne of said southwest quarter section fourteen, township seventeen south, range two west, was afterwards so issued to him by mistake, as aforesaid, said United States Land Department recalled and cancelled the same as having been so issued by mistake and in error and as never having been desired, applied for, or accepted by the said Horne. Wherefore defendant says that said Horne never had any title to said lands sued for in this suit under said patent so set up by plaintiff; and of this he puts himself upon the country.

D. P. BESTOR &
WEBB & TILLMAN,
Att'ys for Def't.

Endorsed: East Lake Land Co. *vs.* I. C. Brown. Replication No. 2. Filed Sept. 16th, 1890. A. W. McCullough, clerk.

29 EAST LAKE LAND COMPANY }
vs.
I. C. BROWN. }

The plaintiff, in reply to the plea of defendant, filed on the 8th day of September, 1890, setting up the fact that since the commencement of this action defendant had obtained a patent for the lands sued for in this action, issued by the United States Government, and that he had accepted the same and was in possession of the same, showing his full title to said lands, says that said lands sued for in this action was duly entered and purchased by Thomas Horne from the United States Government under the provisions of an act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of public lands," which entry and purchase was made by said Thomas Horne on the 12th day of October, 1821, paying in cash for said land one dollar and twenty-five cents ($1.25) per acre at the land office at Tuscaloosa, Alabama, said land being situated in Tuscaloosa land district. The register

of said land office executed and delivered to said Thomas Horne a certificate of entry of said land in words and figures as follows, viz:

No. 884. LAND OFFICE, TUSCALOOSA, *October* 12, 1821.

It is hereby certified that in pursuance of law Thomas Horne, of Jefferson county, on this day purchased of the register of this office the lot or southwest ¼ of section number fourteen, of township number seventeen, in range number two west, containing 161.10 acres, at the rate of $1.25 per acre, amounting to $201.38, for which the said Thomas Horne has made payment in full, as required by law.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office the said Thomas Horne shall be entitled to receive a patent for the lot above described.

JOHN McKEE, *Register.*

And that on the 9th day of July, 1823, the United States Government issued a patent to said Thomas Horne conveying said land to him, which said patent was duly recorded in the General Land Office of said United States of America, in the General Land Office, at Washington, District of Columbia, and that said land was so entered on the Alabama tract book, required by law to be kept in the office of the probate judge of Jefferson county, State of Alabama, as having been entered by Thomas Horne as aforesaid, and that patent had issued to him as aforesaid; that in the land office of the said United States of America, at Montgomery, Alabama, it was on the books of said office so entered that a patent had issued to said Horne as aforesaid.

And the plaintiff avers that in good faith and for a valuable consideration then paid, without notice of any defect in the title thereto, or that the United States of America claimed title thereto, — bought and fully paid for the land sued for from grantors then in possession of said land; that plaintiff took and received from its grantors deeds granting said land to it, with full covenants of warranty; that its grantors when they sold and granted said land to it were in possession of said land, claiming the legal title thereto; and plaintiff avers that it and those (its grantors under which it claims) and their grantors have had continuous and adverse possession of said lands sued for in this action for more than twenty 20 years next prior to the time the said defendant entered upon and took possession of said land sued for in this action.

HEWITT, WALKER & PORTER,
Att'ys for Pl'ff.

Endorsed: No. 91. East Lake Land Co. *vs.* I. C. Brown. Filed Sept. 16th, 1890. A. W. McCullough, clerk. Replication.

31 In the Circuit Court of the United States, Southern Division, Northern District of Alabama.

EAST LAKE LAND COMPANY
vs.
ISAIAH C. BROWN.

The plaintiff demurs to the rejoinder No. 1 to the replication of plaintiff, and sets down and assigns the following causes of demurrer thereto, viz:

The facts alleged in said rejoinder show that at the time the patent issued to Thomas Horne and was recorded conveying the lands in controversy from the U. S. Government to Thomas Horne the entry of the said Thomas Horne was a subsisting entry and authorized the issuance of said patent.

2. The facts alleged and set forth in the said rejoinder do not take from the plaintiff the protection given by law and claimed by it as a *bona fide* purchaser of the land sued for.

HEWITT, WALKER & PORTER,
Att'ys for Pl'ff.

Endorsed: No. 91. East Lake Land Co. *vs.* Isaiah C. Brown. Demurrer to rejoinder to plaintiff's replication. Filed Sept. 16th, 1890. A. W. McCullough, clerk.

32 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 24th day of September, A. D. 1890, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the first Monday of September, A. D. 1890, and of the Independence of the United States of America the one hundred and 15th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

EAST LAKE LAND CO.
vs. 91.
ISAIAH C. BROWN.

This cause coming on to be heard upon plaintiff's demurrer to defendant's rejoinder, come the parties, by their attorneys, and, after argument of counsel and due consideration, it is ordered by the court that said demurrer be, and the same is hereby, overruled.

33 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 26th day of September, A. D. 1890, it being a day of the regular term of the circuit

court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the first Monday of September, A. D. 1890, and of the Independence of the United States of America the one hundred and 15th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

EAST LAKE LAND CO.
vs.
ISAIAH C. BROWN.

Come the parties, by their attorneys, and comes also a jury of good and lawful men, to wit, T. N. Anglin and eleven others, who are duly elected, empaneled, and sworn herein to well and truly try the issues joined and a true verdict render according to the evidence, and the trial of this cause proceeds.

During the examination of witnesses, the usual hour of adjournment having arrived, it is ordered by the court that the further trial of this cause be continued until to-morrow morning at ten o'clock.

34 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 27th day of September, A. D. 1890, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the first Monday of September, A. D. 1890, and of the Independence of the United States of America the one hundred and 15th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

EAST LAKE LAND CO.
vs.
ISAIAH C. BROWN. } 91.

This being the day and hour to which the further trial of this cause was on yesterday continued, come again the parties, by their attorneys, come again the jury who were duly elected, empaneled, and sworn herein as aforesaid, and the trial of this cause proceeds.

Having heard the evidence by the parties adduced, arguments of counsel, and charge of the court, the jury render their verdict in writing, signed by their foreman, and upon their oath do say: "We, the jury, find the issues joined in favor of the defendant."

It is therefore considered by the court that the defendant go hence discharged from this suit and that the plaintiff pay the costs of this suit; for which let execution issue.

35 BIRMINGHAM, ALA., *Jan'y* 20, 1891.

Hon. Jno. Bruce, judge.

DEAR SIR: We have agreed upon the accompanying bill of exceptions to be signed to you in the case of East Lake Land Co. *vs.* I. C. Brown, and request you to sign the same and date it as of term time.

Yours respectf'y,

WEBB & TILLMAN,
Att'ys for I. C. Brown.
HEWITT, WALKER & PORTER,
Attorneys for Plaintiff, East Lake Land Company.

Endorsed: 91. Law. East Lake Land Company *vs.* Isaiah C. Brown. Agreement of counsel. Filed February 5th, A. D. 1891. N. W. Trimble, clerk.

36 Know all men by these presents that we, East Lake Land Company, William A. Walker, and Robert Jemison, are held and firmly bound unto Isaiah C. Brown in the full and just sum of five hundred dollars, to be paid to the said Isaiah C. Brown, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 6th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a term of the circuit court of the United States for the southern division of the northern district of Alabama, in a suit depending in said court between the said East Lake Land Company, a body cor-rate, plaintiff, and the said Isaiah C. Brown, defendant, a judgment was rendered against the said East Lake Land Company, and the said East Lake Land Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Isaiah C. Brown, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said East Lake Land Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

EAST LAKE LAND COMPANY,
By ROBT JEMISON, *Pres't.* [SEAL.]
ROBT JEMISON. [SEAL.]
WM. A. WALKER. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
JOHN BRUCE, *Judge.*

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Isaiah C. Brown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern division of the northern district of Alabama, wherein the East Lake Land Company, a body corporate, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf, which judgment was rendered by said circuit court whilst the Honorable John Bruce, judge of the district court of the United States for the northern district of Alabama, was presiding and holding said circuit court.

Witness the Honorable John Bruce, judge of the district court of the United States for the northern district of Alabama, this sixth day of March, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN BRUCE, *Judge.*

38 On this 6th day of March, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared before me, N. W. Trimble, clerk of the circuit court of the United States for the southern division of the northern district of Alabama, the subscriber, W. A. Porter, and maker oath that he delivered a true copy of the within citation to Webb and Tillman, the attorneys of record, and for Isaiah C. Brown, the defendant in error named in the within citation.

W. A. PORTER.

Sworn to and subscribed the 6th March, A. D. 1891.

N. W. TRIMBLE, *Clerk.*

We, being attorneys of record of the within-named defendant in error, Isaiah C. Brown, do hereby, as such attorney-, accept due and legal service of the within citation duly issued and directed to said Isaiah C. Brown March 6th, 1891.

WEBB AND TILLMAN,
Att'ys for I. C. Brown, Def't.

The within citation was this day duly filed in my office with a copy thereof for said Isaiah C. Brown.
March 6th, 1891.

N. W. TRIMBLE,
Clerk of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the southern division of the northern district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The East Lake Land Company, a body corporate, plaintiff, and Isaiah C. Brown, defendant, which judgment was rendered whilst the Honorable John Bruce, judge of the district court of the United States for the northern district of Alabama, was presiding and holding said circuit court, a manifest error hath happened, to the great damage of the said East Lake Land Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 6th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

N. W. TRIMBLE,
Clerk of the Circuit Court of the United States, Northern Dist. Ala.

Allowed by—
JOHN BRUCE, *Judge.*

We, being attorneys of record of the within-named defendant in error, Isaiah C. Brown, do hereby, as such attorneys, accept due and legal service of the within writ of error, which has been duly issued and deposited, with a copy thereof for said defendant in error, in the office of the clerk of said circuit court mentioned in this said writ of error.

March 6th, 1891.

WEBB & TILLMAN,
Att'ys for Isaiah C. Brown, Def't.

The within writ of error duly issued, as well as a copy thereof for said Isaiah C. Brown, was this day filed and deposited in my office this March 6th, 1891.

N. W. TRIMBLE,
Clerk of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

40 In the United States Circuit Court for the Southern Division of the Northern District of Alabama.

EAST LAKE LAND COMPANY
vs.
ISAIAH C. BROWN.

Be it remembered that on the trial of this cause the following proceedings were had, to wit:

The plaintiff offered in evidence the following part of a duly certified transcript from the records of the Land Office in Washington, to wit:

No. 884. LAND OFFICE, TUSCALOOSA, *October* 12, 1821.

It is hereby certified that, in pursuance of law, Thomas Horne, of Jefferson county, on this day purchased of the register of this office the lot or southwest quarter of section number fourteen, of township number seventeen, range number two west, containing 161.10 acres, at the rate of $1.25 per acre, amounting to $201.38, for which the said Thomas Horne has made payment in full, as required by law.

Now, therefore, be it known that on the presentation of this certificate to the Commissioner of the General Land Office the said Thomas Horne shall be entitled to receive a patent for the lot above described.

JOHN McKEE, *Register.*

Which said transcript contained the following:

"Patent ret'd on the 26 day of October, 1825, in consequence of the Commissioner's letter of the 25 July, 1825. See those letters on file. The patent cancelled."

The defendant objected to the testimony so offered unless the plaintiff at some time read the whole contents of said transcript to the jury and not simply a part. The plaintiff insisted on offering in evidence only so much of said transcript as was down to and included the word "register." The court sustained the objection made by defendant, whereupon the plaintiff excepted and declined to read the following words of said transcript in evidence, viz: "Patent returned on the 26 Octob., 1825, in consequence of the Commissioner's letter of the 25 July, 1825. See those letters on file. The patent cancelled."

41 The plaintiff then, protesting against the ruling of the court requiring it to read the whole and not a part of said transcript in evidence, read in evidence the whole of said transcript as above set out.

The plaintiff thereupon read in evidence without objection an instrument in writing in words and figures as follows, to wit:

(4–131.)

No. 884. RECEIVER'S OFFICE AT TUSCALOOSA, 12 *Oct.*, 1821.

(Duplicate.)

Received from Thomas Horne, of Jefferson Co., the sum of two hundred and one $\frac{38}{100}$ dollars, being in full for S. W. $\frac{1}{4}$ section No. 14, township No. 17, range No. 2 W., containing 161.10 acres, at the rate of one dollar and twenty-five cents per acre—cash, $201.38.

WM. G. PARISHE, *Receiver.*

Stock.
(6431—50 M.)

Both of said instruments in writing, exactly as above set forth, were duly and properly certified as true and literal exemplifications from the files and records of the General Land Office at Washington, and no objections were made to either on account of certificates.

The plaintiff then offered to read in evidence another duly certified transcript from the Land Office at Washington, which transcript was shown to the court, and plaintiff stated to the court that it only proposed to offer and read in evidence so much of said transcript as purported to be a patent and ending at the words "Commissioner of the General Land Office." The defendant objected to the using in evidence said certified transcript unless the whole of it was admitted as evidence. Said certified transcript was as follows, to wit:

(4–130.)

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Certificate No. 884.

Whereas Thomas Horne, of Jefferson county, has deposited in the General Land Office of the United States a certificate of the register of the land office at Tuscaloosa, in Alabama, whereby it appears that full payment has been made by the said Thomas Horne
42 according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of the public lands," for the southwest quarter of section fourteen, of township seventeen, of range two west, in the district of Tuscaloosa and State of Alabama, containing one hundred and sixty-one acres and ten hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Thomas Horne:

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant, unto the said Thomas Horne and to his heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and ap-

purtenances of whatsoever nature thereunto belonging, unto the said Thomas Horne and to his heirs and assigns forever.

In testimony whereof I, James Monroe, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereto affixed.

Given under my hand at the city of Washington the ninth day of July, in the year of our Lord one thousand eight hundred and twenty-three, and of the Independence of the United States the forty-eight.

By the President :

J. M.

Recorded vol. 2, page 400. (8889–3000) o- 6–114.

G. G.,
Commissioner of the General Land Office.

The cancelled patent attached hereto was returned in consequence of the Commissioner's letter of the 25th of July, 1825, and received from the register in his letter of October 26, 1825. For reasons, refer to those letters.

The court sustained the objection of defendant and ruled that the plaintiff could not offer in evidence against defendant's objections a part of said certified transcript without offering in evidence the following part thereof, viz: "The cancelled patent attached thereto was returned in consequence of the Commissioner's letter of the 12th of July, 1825, and received from the register in his letter of October 26, 1825. For reasons, refer to those letters." To which ruling of the court the plaintiff excepted. The plaintiff then, protesting that it should not be required to read in evidence the whole of said transcript, but only so much thereof as purported to be a patent as above set out, read in evidence the whole of said certified transcript. All of said transcript as above set forth was duly certified under one certificate attached thereto as true and literal exemplifications from the records of the General Land Office at Washington.

43

The plaintiff thereupon introduced evidence tending to show that about the year 1824 one John B. Daniel was living upon the lands in controversy and in possession thereof, claiming title thereto under a purchase from one William Daniel; that said John B. Daniel remained in possession of said lands openly, notoriously, and continuously, claiming title thereto and cultivating the same until about the year 1845; that about the year 1845 the said John B. Daniel sold said lands to one Willis Eastis, and said Willis Eastis immediately after he purchased said lands went into possession thereof, and remained in possession thereof openly, notoriously, and continuously, claiming title thereto under the purchase from said John B. Daniel, and cultivating the same until he sold the said lands to Daniel Eastis about the year 1850; that on the 22nd day of March, 1862, forty acres of this land, viz, the northeast quarter of the southwest quarter of section fourteen, township seventeen south, range two west, was sold as the property of Thomas Horne by the tax col-

lector of Jefferson county, Alabama, for the purpose of paying the taxes assessed in 1851 for the State of Alabama and county of Jefferson for the years 1845, '46, '47, '48, '49, 1850, and 1851, against Thomas Horne, on the southwest quarter of section fourteen, township seventeen south, range two west; that at such tax sale Daniel Eastis was the purchaser of said northeast quarter of the southwest quarter of said section fourteen, and on the said 22nd day of March, 1852, the said tax collector made a conveyance of said northeast quarter of the southwest quarter of said section fourteen to said Daniel Eastis; that immediately after he purchased the lands in controversy in 1850 the said Daniel Eastis went into possession thereof, claiming title thereto under such purchase, and remained in possession openly, notoriously, and continuously, claiming such title until he sold said lands to Thomas Barton about the year 1855.

Thereupon the plaintiff introduced evidence showing that before the sale of the lands in controversy to Thomas Barton the said Daniel Eastis, while in possession thereof, left home, and at the time of his departure declared that he was going to the State of
44 Mississippi, and that after being absent from home some time he returned. The plaintiff then offered to prove by James Eastis, a son of Daniel Eastis, that when Daniel Eastis was about to set out on the said journey to Mississippi he stated that he was going there to see if he could find Thomas Horne and buy from said Thomas Horne the lands in controversy.

The defendant objected to so much of said evidence as stated the purpose of his visit. The court sustained the defendant's objections and excluded said evidence so offered by the plaintiff, and the plaintiff excepted to the exclusion of such evidence.

The plaintiff thereupon offered to prove by said James Eastis that said Daniel Eastis stated upon his return home after said journey that he had bought the lands in controversy from Thomas Horne. The defendant objected to such evidence, the court sustained the defendant's said objection and excluded such evidence, and the plaintiff excepted to the exclusion of such evidence.

The plaintiff thereupon offered to prove by said James Eastis that said Daniel Eastis stated upon his return home *that* after said journey that he had a deed from said Thomas Horne to the lands in controversy. The defendant objected to such evidence, the court sustained the defendant's said objection and excluded such evidence, and the plaintiff excepted to the exclusion of such evidence.

The plaintiff thereupon offered to prove by said James Eastis that after Daniel Eastis returned home from said journey, and while he was in possession of said lands, he, said Daniel Eastis, claimed title to said lands in controversy under a purchase thereof from said Thomas Horne. The defendant objected to so much of said testimony as tended to show that Daniel Eastis bought said lands from Thomas Horne, the court sustained the defendant's said objection and excluded so much of said evidence as tended to show that Daniel Eastis bought said lands from Thomas Horne, and the plaintiff excepted to the exclusion of such evidence. The plaintiff

then introduced evidence showing that the title deeds belonging to Daniel Eastis were all destroyed by the United States army in the spring of 1865.

The plaintiff thereupon introduced evidence showing that immediately after said Thomas Barton purchased the lands in controversy he went into the possession thereof and remained in possession openly, notoriously, and continuously, claiming title thereto under his said purchase from Daniel Eastis, and that said Thomas Barton cultivated the lands in controversy until his death in 1858.

The plaintiff thereupon offered to prove by B. F. Barton, a
45 son of Thomas Barton, that while in possession of the lands in controversy the said Thomas Barton stated that he claimed title to said lands under a deed from said Daniel Eastis. The defendant objected to so much of said testimony as tended to show Thomas Barton's source of title to the lands in controversy, the court sustained the defendant's said objection and excluded such evidence, and the plaintiff excepted to the exclusion of such evidence, but the plaintiff was allowed to prove that Thomas Barton claimed to be the owner of and occupied said land.

Thereupon the plaintiff introduced evidence showing that after the death of said Thomas Barton, intestate, his widow and heirs-at-law went into the possession of the lands in controversy and remained in possession openly, notoriously, and continuously, claiming title thereto, and cultivated the same until the 6th day of November, 1869, when the said lands in controversy were sold for division among the said heirs, who were the joint owners thereof, by James Wilson and others, commissioners appointed to make such sale by the probate court of Jefferson county, Alabama; that at such commissioners' sale one George Barton bought the northeast quarter of the southwest quarter of said section fourteen, and one W. D. Levett bought the northwest quarter of the southwest quarter of said section fourteen; that immediately after said commissioners' sale the said George Barton went into the possession of said northeast quarter of the southwest quarter of said section fourteen and remained in possession openly, notoriously, and continuously, claiming title thereto under such purchase and a conveyance thereof made to him by the said commissioners on the 6th day of February, 1872, which said commissioners' deed conveyed all the right, title, and interest that the joint owner of the lands in controversy had in and to the same; that said George Barton, after his said purchase of said northeast quarter of the southwest quarter of said section fourteen, cultivated a portion of the same, with nearly all of it under fence, until he sold and conveyed the same, with general covenants of warranty of title, to one R. P. Noble, on the 20th day of February, 1872; that said Noble, after said N. E. ¼ of N. W. ¼ of said section 14 was sold and conveyed to him, went into the possession thereof and remained in possession openly, notoriously, and continuously, claiming title thereto and cultivating the same until he sold and conveyed the same, with general covenants of the warranty of title, to Oliver Wyle, on the 3rd day of May, 1887; that immedi-
46 ately after the sale and conveyance of said N. E. ¼ of S.

W. ¼ of said section 14 by said Noble to said Wylie the said Wylie went into possession thereof under such conveyance and remained in possession openly, notoriously, and continuously, claiming title thereto and cultivating the same until he sold and conveyed the same, with general covenants of warranty of title, to T. J. Stubbs, on the 31st day of January, 1881; that immediately after the sale and conveyance of said N. E. ¼ of S. W. ¼ of said section 14 by said Wylie to said Stubbs the said Stubbs went into the possession thereof under such conveyance and remained in possession openly, notoriously, and continuously, claiming title thereto and cultivating the same until he sold and conveyed, with general covenants of warranty, all of said N. E. ¼ of S. W. ¼ of said section 14 in controversy in this suit to William H. Wood, on the 5th day of July, 1886; that immediately after the sale and conveyance of all of said N. E. ¼ of S. W. ¼ of said section 14 in controversy in this suit by said Stubbs to said Wood the said Wood went into possession thereof under such conveyance and remained in possession openly, notoriously, and continuously, claiming title thereto and cultivating the same until he sold and conveyed the same, with general covenants of warranty, to Robert Jemison and James A. Van Hoose, on the 6th day of July, 1886; that the said N. W. ¼ of S. W. ¼ of said section 14 was conveyed by the said commissioners to said W. D. Lovett on the 5th day of August, 1871, and said commissioners' deed conveyed to said Lovett all the right, title, and interest the said joint owners had in and to the lands in controversy; that immediately after said sale to him on said 6th day of November, 1869, the said Lovett went into the possession of the said N. W. ¼ of S. W. ¼ of said section 14 and remained in possession openly, notoriously, and continuously, claiming title thereto under such sale and conveyance and cultivating the same until he sold and conveyed the same, with general covenants of warranty of title, to E. A. Ferguson, on the 16th day of October, 1880; that immediately after such sale and conveyance to said Ferguson he went into possession of the said N. W. ¼ of S. W. ¼ of said section 14 and remained in possession openly, notoriously, and continuously, claiming title thereto under such conveyance and cultivating the same until he sold and conveyed the same, with general covenants of warranty of title, to Samuel Torrey, on the 20th day of March, 1886; that immediately after such sale and conveyance of said N. W. ¼ of S. W. ¼ of said section 14 by said Ferguson to said Torrey
47 the said Torrey went into the possession thereof and remained in possession openly, notoriously, and continuously, claiming title thereto and cultivating the same until he sold and conveyed the same, with general covenants of warranty of title, to Robert Jemison and James A. Van Hoose, on the 8th day of July, 1886; that after the sale and conveyance as aforesaid of all the lands in controversy in this suit to said Jemison and Van Hoose they went into the possession thereof and remained in possession openly, notoriously, and continuously, claiming title under said two conveyances to them until they sold and conveyed the same, with general covenants of warranty of title, to the plaintiff, The East Lake

Land Company, on the 15th day of October, 1886; and the East Lake Land Company, immediately after the sale and conveyance of the said lands to it by the said Jemison and Van Hoose, went into the possession thereof and remained in possession openly, notoriously, and continuously, claiming title thereto until the defendant went into possession thereof under his alleged homestead entry number 19700 of the said lands, which he claimed to have made on or about the 23d day of April, 1887, in the land office at Montgomery, Alabama.

The plaintiff thereupon introduced in evidence, without objection, an abstract from the Alabama tract book for Jefferson county; which said abstract was in words and figures as follows, to wit:

Township 17 South, Range 2 West, Huntsville Meridian, State of Alabama.

Description of the tract.		Area.		United States title—to whom sold or granted.	Date of sale.—Location of grant.	Number of certificate or warrant.
Part of section.	Section.	Acres.	100ths.			
S. W. ¼.	14	160	10	Thomas Horne.	Oct. 12, 1821.	884

And it was further shown in evidence by the plaintiff that this entry appeared intact upon said tract book.

The plaintiff then offered in evidence, without objection, a paper writing in words and figures as follows, to wit:

U. S. LAND OFFICE, MONTGOMERY, ALA.

I, J. H. Bingham, register of the United States land office, Montgomery, Ala., hereby certify that the S. W. ¼ of section 14, tp. 17 S., R. 2 W, was entered for cash at Tuscaloosa, Ala., by Thomas Horne on October 12th, 1821, for receiver's duplicate cash receipt No. 884, and patented July 9th, 1823; that said entry appeared
48 intact upon the records of this office until cancelled by Commissioner's letter "C", of April 25th, 1887, when, on Ap'l 23d, 1887, Isaiah C. Brown made homestead entry No. 19700 for the same land, which he commuted to cash entry No. 22684, under sec. 2301, U. S. R. S., on May 14th, 1888. The said cash entry No. 22684 of Isaiah C. Brown for the above-described land was patented to him on M'ch 10th, 1890.

Given under my hand this the 17th day of September, 1890.

J. H. BINGHAM,
Register of U. S. Land Office.

The plaintiff thereupon introduced evidence showing that the lands in controversy were of the value of at least seven thousand dollars, and that the annual rental value thereof was $200.00.

The defendant thereupon offered and read in evidence, without objection, an instrument in writing in words and figures as follows, to wit:

(4–131.)

No. 884. RECEIVER'S OFFICE AT TUSCALOOSA,
October 12th, 1821.

Received of Thomas Horne, of Jefferson county, the sum of two hundred and one $\frac{38}{100}$ dollars *and — cents*, being in full for the S. W. $\frac{1}{4}$ *quarter* of section No. 14, in township No. 17, range No. W. 1; containing 161 $\frac{10}{100}$ acres, at one dollars and twenty-five cents per acre.

Cash, $201.38.

(Signed) WM. G. PARISHE, *Receiver.*

Stock 11,508 (50 M.)

And attached thereto was a certificate in words and figures as follows, to wit:

UNITED STATES LAND OFFICE,
MONTGOMERY, ALA., *March 12th*, 1888.

I, J. G. Harris, register of the United States land office, do hereby certify that the foregoing receiver's receipt hereto annexed is a true copy in every particular of the original on file in this office, the same having been carefully examined and compared by me with the said original and found to agree therewith word for word and figure for figure.

Given under my hand the day and date above written.

J. G. HARRIS, *Register.*

49 The defendant thereupon offered and read in evidence, without objection, a duly certified copy of an instrument in writing in words and figures as follows, to wit:

(4–131.)

No. 884. RECEIVER'S OFFICE, TUSKALOOSA, 12 *Oct.*, 1821.

(Duplicate.)

Received from Thomas Horne, of Jefferson county, the sum of two hundred & one dollars and $\frac{38}{100}$ cents, being in full for the S. W. $\frac{1}{4}$ section No. 14, in township No. 17, of range No. 2 W., containing 161 acres and $\frac{10}{100}$ *hundre-ths*, at $1.25 per acre.

$201.38. WM. G. PARISH, *Receiver.*

(9691–50 M.)

The defendant thereupon offered in evidence a duly certified copy of an instrument in writing on record in the office of the General Land Office in words and figures as follows, to wit:

(4–189.)

No. 884. LAND OFFICE, TUSKALOOSA, *October 12th*, 1821.

It is hereby certified that in pursuance of law Thomas Horne, in Jefferson county, *of* this day purchased of the register of this office

the southwest quarter of section No. fourteen, in township No. seventeen, of range No. 2 west, containing $161\frac{10}{100}$ acres, at the rate of $1.25 per acre, amounting to $201.38, for which the said Thomas Horne has made payment in full as required by law.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office the said Thomas Horne shall be entitled to receive a patent for the lot above described.

(9295–50 M.) JOHN McKEE, *Register.*

"Patent ret'd on the 26th October, 1825, in consequence of the Commissioner's letter of the 25 July, 1825. See those letters on file. The patent cancelled."

The plaintiff objected to so much of said certified transcript as was and is in these words: "Patent ret'd on the 26th October, 1825, in consequence of the Commissioner's letter of the 25th July, 1825. See those letters on file. The patent cancelled," because it was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objections and allowed the defendant to read in evidence the whole of said certified transcript; to
50 which ruling of the court the plaintiff excepted.

The defendant thereupon offered to read in evidence a duly certified copy of the record of the General Land Office which is in words and figures as follows, to wit:

Abstract from Tuskaloosa Tract Book, Vol. 1, page 211. (4–600)

Township No. 17.

Description of tract.				Contents.		Rate per acre.		Purchase-money.		Name of the purchaser.
Part of section.	Section.	Town'p.	Range.	Acres.	100ths.	Dolls.	Cts.	Dollars.	Cents.	
Southwest ¼	14	17	2 W.	161	10	1	25	201	38	Thomas Horne.

Range No. 2 W M. L., District of Tuskaloosa.

Date of sale.	Number of receipt and certificate of purchase.	To whom patented.	Date of patent.	Where recorded: volume, page.
12th Oct., 1821	884	(See cancelled pat. rec. Tus., vol. 2, p. 400. Thomas Horne. Money refunded to Thomas Horne 21st Aug., 1823. Credited in rec'rs acc't, 1st qr., 1832.	9 July, 1823.	Erroneously patented. See letter to register, 25th July, 1825.

The plaintiff objected to said copy of said record because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read said copy of said record in evidence, and the plaintiff excepted.

The defendant thereupon, without objection, offered and read in evidence a duly certified copy and true and literal exemplification of an original patent on file and of record in the General Land Office, which is in words and figures as follows, to wit:

(4–430.)

THE UNITED STATES OF AMERICA:

To all whom these presents shall come, Greeting:

51 *Certificate No.* 884.

Whereas Thomas Horne, of Jefferson county, has deposited in the General Land Office of the United States a certificate of the register of the land office at Tuskaloosa, in Alabama, whereby it appears that full payment has been made by the said Thomas Horne according to the provisions of the act of Congress of the 25th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the southwest quarter of section fourteen, of township seventeen, of range two west, in the district of Tuskaloosa and the State of Alabama, containing one hundred and sixty-one acres and ten hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Thomas Horne:

Now know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these premises do give and grant, unto the said Thomas Horne and

to his heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Thomas Horne and to his heirs and assigns forever.

In testimony whereof I, James Monroe, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the ninth day of July, in the year of our Lord one thousand eight hundred and twenty-three, and of the Independence of the United States the forty-eighth.

[L. S.]

By the President:

JAMES MONROE.

GEORGE GRAHAM,
Commissioner of the General Land Office.

Recorded vol. 2, page 400. (8889–3,000.) 06–114.

Which said patent had written across it in red ink, as shown by said certified transcript and as a part thereof, the words as follows, to wit: "Cancelled. Purchase-money refunded and applied to the paym't of another tract."

The plaintiff objected to so much of said transcript as was
52 and is as follows, to wit: "Cancelled. Purchase-money refunded and applied to the payment of another tract," as illegal, irrelevant, incompetent, and immaterial evidence. The court overruled plaintiff's said objections and allowed the defendant to read the whole of this said certified transcript in evidence; to which ruling of the court the plaintiff excepted.

The defendant thereupon offered in evidence a duly certified copy and true and literal exemplifications of a letter or instrument in writing as the same appears of record in the General Land Office, which letter was in words and figures as follows, to wit:

TREASURY DEPARTMENT,
GENERAL LAND OFFICE, *25th July*, 1825.

Wm. P. Gould, Esq., register of land office, Tuscaloosa.

SIR: On the 12th of Oct., 1821, Thomas Horne entered at the land office at Tuskaloosa the southwest quarter of section 14, town. 17, range 2 west, containing 161.10 acres, rec't No. 884, & it appears from evidence received in 1823 that said Horne intended to enter land in the 17th section, and that authority was given to the receiver to refund the purchase-money and permit its application to the correct tract. The receiver has refunded the money accordingly, but it appears a patent has been issued for the S. W. ¼, 14, 17, 2 W., bearing date the 9th of July, 1823, an accident which arose from the circumstance of the books not being opened for the Tuskaloosa district when correction was authorized, so that no refund could be noted. It now be- necessary that Thomas Horne execute a formal deed of relinquishment to the United States for the land

erroneously patented, & that he also surrender the patent for the same. The discovery of the error has just been made, & your attention to these instructions is respectfully requested as soon as possible.

Very respectfully, your ob't serv't,

J. M. MOORE,
Ch. Clk for the Comm'r.

53 The plaintiff objected to the said copy of said letter because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read the said copy of said letter in evidence, and the plaintiff excepted.

The defendant thereupon offered in evidence a duly certified copy and true and literal exemplification of a letter or instrument in writing as the same appears of record in the General Land Office; which said letter was in words and figures as follows, to wit:

S. W. ¼, 17, 2 W.

LAND OFFICE, TUSKALOOSA, *October* 26, 1825.

SIR: Your letter of 25th was recived in due time, but an answer has been delayed in consequence of being unable to ascertain the present place of abode of Thomas Horne, the person therein mentioned. He removed from this State to McMinn county, Tennessee. I have been informed he has since changed his residence, and my endeavors to discover where a letter would reach him have been without effect. The patent was cancelled on its reception at this office and is returned herewith.

Very respectfully, I am, sir, your obedient servant,

WM. P. GOULD, *Register.*

George Graham, Esq., Commissioner of the General Land Office.

The plaintiff objected to the copy of said letter because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read the said copy of said letter in evidence, and the plaintiff excepted.

The defendant thereupon offered in evidence a duly certified copy and true and literal exemplification of an abstract taken from the Tuskaloosa tract book as the same appears on file and of record in the General Land Office; which said certified copy was in words and figures as follows, to wit:

The defendant then offered in evidence a duly certified copy and true and literal exemplification of an instrument in writing as the same appears of record and on file in the General Land Office; which said instrument was in words and figures as follows, to wit:

Abstract from Tuskaloosa Tract Book, Vol. 1, page 212.

54 Township No. 17.

Description of tract.				Contents.		Rate per acre.		Purchase money.		Name of purchaser.
Part of section.	Section.	Township.	Range.	Acres.	100ths.	Dollars.	Cents.	Dollars.	Cents.	
E. ½ of S.W. ¼	17	17	2 W.	79	50½	1	25	99	49	Thomas Horne.

Range 2 W., District of Tuskaloosa.

Date of sale.	Number of receipt and certificate of purchase.	To whom patented.	Date of patent.	Where recorded.	
				Volume.	Page.
14 Nov., 1821	1804	Thomas Horne.	12 April, 1824.		

The plaintiff objected to the said copy of said abstract because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read in evidence the said copy of said abstract, and the plaintiff excepted.

The defendant thereupon offered in evidence a duly certified copy and true and literal exemplification of a record in the General Land Office, which is in words and figures as follows, to wit:

Extract from the receiver's account, dated April 29th, 1833, vol. 1 "C," p. 117:

For amount repaid Thomas Horne per rec't dated 1st Aug't, 1823, being the amount erroneously paid by him for S. W. ¼, 14, 17, 2 W., cont'g 161 $\frac{19}{100}$ acres, suspended 3rd quarter, 1823.

The plaintiff objected to said copy of said record because
55 the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read said copy of said record in evidence, and the plaintiff excepted.

STATE OF ALABAMA, }
Tuskaloosa County, } *To wit:*

This day Thomas Horne appeared before me, Hume R. Field, judge of the county court of Tuskaloosa, and deposed upon the holy evangelist of almighty God that he came to the town of Tuskaloosa for the purpose of entering with the register of the land office a quarter section of land which was offered and not sold, and which

is designated as follows, range 2 west, township 17, section 17, southwest quarter; but that instead thereof he entered the southwest quarter of section 14, in the same range and township; that his mistake was produced by some person altering and changing the mark or figures from 17 to fourteen at the corner.

Given under my hand and seal this 10th day of November, an. Dom. 1821.

his
THOMAS x HORNE. [SEAL.]
mark.
HUME D. FIELD,
Judge of C. Court of Tuskaloosa.

STATE OF ALABAMA, }
Tuskaloosa County. }

I, Henry L. Anthony, clerk of the county court for said county, do hereby certify that Hume D. Field, before whom the foregoing affidavit was taken & who signed the same, was at that time and now is acting judge of the county court for said county, & that full faith & credit are due to all his official acts as such.

In testimony of which I have hereunto set my hand and affixed my private seal, there being no seal of office, this 10th day of November, 1821.

[SEAL.] HENRY L. ANTHONY, *Clk C. C.*

The plaintiff objected to the said copy of said instrument because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and
56 allowed the defendant to read said copy of said instrument in evidence, and the plaintiff excepted.

The defendant then offered in evidence a duly certified copy and true and literal exemplification of a letter or instrument in writing as the same appears on file and of record in the General Land Office; which said copy of said letter is in words and figures as follows, to wit:

LAND OFFICE, TUSKALOOSA, *22d Nov'r*, 1821.

SIR: Enclosed you will receive the affidavit of Thomas Horne setting forth that he has made a mistake in the entry of a certain half quarter section of land therein mentioned. As it is conceived that we do not possess the power to remedy such cases, we have seen proper to submit it to your department.

The desire of Mr. Horne is to transfer the payment made on the tract entered to some other tract. Some time since a similar affidavit in a different case was forwarded to you from this office, concerning which we have received no instructions.

When two purchasers entered the same tract on the same day, in which case the register should have offered it to the highest bidder, unless the second entry was a mistake of his own.

Very respectfully, we are your obedient servants,

WM. G. PARISH.
JOHN McKEE.

Josiah Meigs, Esq.

The plaintiff objected to the said copy of said letter because it was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read said copy of said letter in evidence, and the plaintiff excepted.

The defendant then offered in evidence a certified copy and true and literal exemplification of an endorsement in writing, as the same appears of record in the General Land Office, written on the back of the letter dated November 22nd, 1821, read in evidence as aforesaid; which said endorsement in writing was in words and figures as follows, to wit:

TUSKALOOSA, 22*d Nov.*, 1821.

57 Mess. McKee & Parishe, reg. and receiver:

"In rel. to erroneous entry made by Thomas Horne of S. W. ¼ 14, T. 17, R. 2, instead of S. W. ¼, sec. 17, T. 17, R. 2—

Respectfully submitted to the Secretary of the Treasury whether the error may not be corrected under the provisions of the act of 3rd March, 1819.

The case does not come within the act. Let the officers be instructed in their duty.

W. H. C."

The plaintiff objected to the said copy of said endorsement in writing because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the said endorsement in writing to be read in evidence by the defendant, and the plaintiff excepted.

The defendant then offered in evidence a certified copy and true and literal exemplification of a letter or instrument in writing as the same appears of record in the General Land Office; which copy of said letter was in words and figures as follows, to wit:

GENERAL LAND OFFICE, 2*d January*, 1822.

To the register and to the receiver of the land office at Tuskaloosa.

SIR: It appears from the affidavit of Thomas Horne, enclosed in y'r letter of the 22nd of November last, that the mistake arose from the alteration of the surveyor marks at the corner of the section. Before a decision can be made in the case by the Secretary of the Treasury agreeable to law you will be pleased to give a decided opinion on its merits.

In the case of the entry of the same tract on the same day by Jas. Cunningham & Geo. Nash., viz., the E. ½ of S. W. ¼ of S. 11, T. 16, R. 2 west, entered on the 3rd September last, the person who made the first entry has the right to the land, & the amount paid on the second entry will have to be applied to the purchase of other lands agreeably to the provisions of the act of the 3rd of March, 1819, providing for the correction of errors in entering public lands. This case and all similar cases ought to be reported to the Secre-

58 tary of the Treasury with y'r opinion explicitly stated.

With great respect, &c., J. MEIGS.

The plaintiff objected to the said copy of said letter because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the said copy of said letter to be read in evidence by the defendant, and the plaintiff excepted.

The defendant then offered in evidence a certified copy and true and literal exemplification of a letter or instrument in writing as the same appears of record in the General Land Office; which said copy of said letter was in words and figures as follows, to wit:

RECEIVER'S OFFICE, TUSCALOOSA, *March 19th*, 1822.

SIR: In answer to your favor of the 3rd of Jan'y, I have the honor to inform you that I am decidedly of the opinion that the mistake made by Thomas Horne and others in their entries of land should be rectified and the amount refunded or applied to the purchase of some other tract. Those men, I am creditably informed, are in extreme indigent circumstances and quite illiterate. I hope my opinion of their cases will meet with your concurrence.

I am, very respectfully, your ob't serv't,

WM. G. PARISHE, *Receiver*.

Josiah Meigs, Esquire.

The plaintiff objected to said copy of said letter because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the said copy of said letter to be read in evidence by the defendant, and the plaintiff excepted.

The defendant then offered in evidence a certified copy and true and literal exemplification as the same appears of record in the General Land Office of an endorsement written on the back of said letter, dated March 19th, 1822; which said copy of said endorsement in writing was in words and figures as follows, to wit:

"Respectfully submitted to the Secretary of the Treasury
59 whether the mistake of T. Horne in entering a tract different from what he intended, owing to the change of the marks in the corner from 17 to 14, may not be rectified. Gen'l Land Officer, 27th April, 1822. J. Meigs."

The plaintiff objected to said copy of said endorsement because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read said copy of said endorsement in evidence, and the plaintiff excepted.

The defendant then offered in evidence a certified copy and true and literal exemplification of a letter or instrument in writing, as the same appears of record in the General Land Office; which said copy of said letter was in words and figures as follows, to wit:

GENERAL LAND OFFICE, *8th May*, 1822.

William G. Parish, Esquire, receiver, Tuscaloosa.

SIR: I return the affidavit of Thomas Horne and, agreeab-y to directions from the Secretary of the Treasury, have to advise you that the act of 3rd of March, 1819, requires the register and receiver both to report their opinion on cases coming within its provisions, with the testimony in relation thereto.

The affidavit of the part as to changes of the mark or figure at the corner of the tract is to be corroborated by the testimony of some one or more disinterested persons. I would refer you to the act itself and request that in future the cases which the register and yourself may have reported under it will be reported directly to the Secretary of the Treasury.

I am, sir, very respectfully, J. MEIGS.

The plaintiff objected to said copy of said letter because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read in evidence said copy of said letter, and the plaintiff excepted.

The defendant then offered in evidence a certified copy and a true and literal exemplification of a letter or instrument in writ-
60 ing, as the same appears of record in the General Land Office; which said copy of said letter was in words and figures as follows, to wit:

TREASURY DEPARTMENT, *April* 23, 1823.

SIR: It appears by the report and opinion of the register and receiver of public monies at Tuscaloosa, and by other testimony, that Isaiah Bagley entered by mistake the northwest quarter of section 5, in township 17 and range number 3 west, instead of the west half of the southwest quarter of section 31, and the east half of the southeast quarter of section 32, each in township 16, range number 3 west of the meridian of Huntsville, being the land intended to be entered by the said Isaiah Bagley.

It also appears by the report aforesaid and by other testimony that Thomas Horne entered by mistake the 17th instead of the 14th section in township 17, range 2 west.

I do therefore authorize you by virtue of the power vested in me by the act of the 3rd of March, 1819, to direct the land officer at Tuscaloosa to permit the said Isaiah Bagley and Thomas Horne to withdraw the entr*ys* made by them as above stated and to apply the money paid thereon to the purchase of any other public lands in the said district, or to the payment of lands already purchased of the United States in the district of Tuscaloosa.

I am, very respectfully, your obedient servant,

WM. H. CRAWFORD.

P. S.—The papers in the case are enclosed.

John McLean, Esq., Commissioner of the Gen'l Land Office.

The plaintiff objected to the said copy of the said letter because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read said copy of said letter in evidence, and the plaintiff excepted.

The defendant then offered in evidence a certified copy and a true and literal exemplification of a letter or instrument in writing as the same appears of record in the General Land Office; which
61 said copy of said letter was in words and figures as follows, to wit:

TREASURY DEPARTMENT, 23*d April*, 1823.

John McKee & Wm. G. Parish, register and receiver, Tuscaloosa, Ala.

GENT-: In the absence of the Commissioner I have the honor to enclose you a copy of a letter from the Secretary of the Treasury of the 18th inst. authorizing the correction of the erroneous — made by Isaiah Bagley and Thomas Horne.

You are authorized to withdraw the erroneous entries and permit the payment to be applied to other lands accordingly.

Very respectfully, your obedient servant,

J. W. MOORE, *C. Clk.*

The plaintiff objected to the said copy of said letter because the same is illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read the said copy of said letter in evidence, and the plaintiff excepted.

The plaintiff then offered in evidence a certified copy and true and literal exemplification of a letter, as the same appears of record in the General Land Office; which said letter was in words and figures as follows, to wit:

GENERAL LAND OFFICE, *Aug't* 21*st*, 1823.

SIR: Herewith you will receive one hundred patents from No. 845 to 994, inclusive, the receipt of which you will please acknowledge.

Very respectfully, your obedient servant,

GEORGE GRAHAM.

John McKee, Esqr., reg. land office, Tuscaloosa, Alabama.

The plaintiff objected to said copy of said letter because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's said objection and allowed the defendant to read the said copy of said letter in evidence, and the plaintiff excepted.

62 The defendant then offered in evidence a certified copy and true and literal exemplification of an abstract taken from the tract book and on file and of record in the General Land Office; which said abstract was in words and figures as follows, to wit:

Township No. 17, Range No. 4 W., M. L., District of Tuscaloosa.

Description of tract.				Contents.		Rate per acre.		Purchase-money.		Name of the purchaser.
Part of sec.	Section.	Township.	Range.	Acres.	Hundths.	Dollars.	Cents.	Dollars	Cents.	
E. ½ of S.W. ¼	17	17 S.	2 W.	79	59½	1	25	99	49	Thomas Horn.
E. ½ of S.W. ¼	29	18 "	6 "	79	65	1	25	99	56	Thomas Horne.
E. ½ of S.W. ¼	2	20 "	4 "	80	67	1	25	100	84	Thomas Horne.

Number of register's return.	Date of sale.	Number of receipt and certificate of purchase.	To whom patented.	Date of patent.
5	14 Nov., 1821	1867	Thomas Horne ...	12 April, 1824.
26	1 August, 1823	3595	Thomas Horne....	27 May, 1824.
26	1 Aug't, 1823	3594	Thomas Horne ...	27 May, 1824.

63 The plaintiff objected to said copy of said abstract because the same was illegal, irrelevant, incompetent, and immaterial evidence. The court overruled the plaintiff's objection and allowed the defendant to read said copy of said abstract, and the plaintiff excepted.

The defendant then offered in evidence a certified copy and a true and literal exemplification of an abstract taken from the records as the same appears in the General Land Office; which said abstract from said record was in words and figures as follow*r*, to wit:

GENERAL LAND OFFICE, *29th April*, 1833.

I have examined and adjusted an account between the United States and William G. Parishe, receiver*ed* of public moneys at Tuscaloosa, Ala., from the 1st January, 1832, to the 31st March following, inclusive, and find that he is entitled to the following credits, viz: For amount repaid Thomas Horne per rec't dated 1st Aug't, 1823, being the am't erroneously paid by him for S. W. ¼, 14, 17, 2 W., cont'g 161.10 acres, suspended third quarter, 1823, $201.38. * * * As appears, etc.

ELIJAH HAYWOOD,
Commissioner Gen'l Land Office.

To Joseph Anderson, Esq., First Comptroller of the Treasury.

The plaintiff objected to said abstract from said record because the same was illegal, irrelevant, incompetent, and immaterial evi-

dence. The court overruled the plaintiff's said objection and allowed the defendant to read in evidence the said abstracts from said record, and the plaintiff excepted.

The defendant then offered in evidence an original patent, which was in words and figures as follows, to wit:

Certificate No. 22684.

The United States of America to all to whom these presents shall come, Greeting:

Whereas Isaiah C. Brown, of Jefferson county, Alabama, has deposited in the General Land Office of the United States a certificate of the register of the land office at Montgomery, Alabama,
64 whereby it appears that full payment has been made by the said Isaiah C. Brown, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," and the act supplemental thereto, for the southwest quarter of section fourteen, in township seventeen south, of range two west, of Huntsville meridian, in Alabama, containing one hundred and sixty-one acres and ten hundreths of an acre, according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Isaiah C. Brown:

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant unto the said Isaiah C. Brown and to his heirs the said tract above described; to have and to hold the same, together will all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Isaiah C. Brown and to his heirs and assigns.

In testimony whereof I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the 8th day of March, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

By the President:

BENJAMIN HARRISON,

[SEAL.] By M. McKEAN, *Secretary.*

J. M. TOWNSEND,

Recorder of the General Land Office.

Recorded, Vol. 39, page 287.

The plaintiff objected to the said patent because the same was illegal, incompetent, irrelevant, and immaterial evidence; and, further, because it appeared from the evidence in this cause that the said patent so offered in evidence was void, the lands therein described having been patented to Thomas Horne on the 9th day of

July, 1823. The court overruled the plaintiff's said objection and allowed the said patent to be read in evidence by the said defendant, and the plaintiff excepted.

The foregoing was substantially all the evidence introduced on the trial of this cause.

65 The plaintiff thereupon asked the court in writing to give to the jury the following charge, which was in writing, to wit: "If you believe the evidence in this case you must find the issues in favor of the plaintiff." The court refused to give this charge, and the plaintiff excepted to the refusal to give the said charge.

The defendant then asked the court in writing to give to the jury the following charge, which was in writing, to wit:

If you believe the evidence in this cause you must find the issues in favor of the defendant. The court gave the said charge so requested by the defendant, and the plaintiff excepted to the ruling of the court in giving the said charge requested by the defendant.

And the plaintiff now tenders this its bill of exceptions and prays that the same may be signed, sealed, and made a part of the record in this cause, which is accordingly done in term time this October 6th, 1890.

JOHN BRUCE, *Judge.*

Endorsed: 91. (Law.) East Lake Land Company *vs.* Isaiah C. Brown. Bill of exceptions. Filed February 5th, A. D. 1891. N. W. Trimble, clerk.

66 UNITED STATES OF AMERICA, }
Northern District of Alabama, Southern Division. }

I, Nathaniel W. Trimble, clerk of the circuit court of the United States for the southern division of the northern district of Alabama, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record in said court and in a certain cause lately in said court pending, wherein The East Lake Land Company was plaintiff and Isaiah C. Brown defendant, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Birmingham, in said district, this 17th day of March, A. D. 1891.

U. S. Circuit Court, N. D. of Ala., Sou. Div.

N. W. TRIMBLE,
Clerk U. S. Circuit Court, Sou. Div., Nor. Dist., Ala.

Endorsed on cover: N. Alabama, C. C. U. S. No. 1102. The East Lake Land Company, plaintiff in error, *vs.* Isaiah C. Brown. Filed April 4, 1891.

Office Supreme Court U. S.
FILED.
NOV 14 1891
JAMES H. McKENNEY,
CLERK

(15-5-488)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE EASTLAKE LAND COMPANY,
PLAINTIFF IN ERROR,
vs.
ISAAC C. BROWN.

No. 1,102

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF.

JOHN T. MORGAN,
Attorney for Plaintiff.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE EASTLAKE LAND COMPANY,
PLAINTIFF IN ERROR,
vs.
ISAAC C. BROWN.
} No. 1,102.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

Suit was brought by plaintiff in City Court of Birmingham, Alabama, to recover by a statutory action of tresspass, the land in controversy.

The case was removed, upon petition of defendant, to the Circuit Court of the United States for the Northern District of Alabama.

The defendant pleaded the general issue and the three special pleas set out in the record.

The plaintiff in error claims title under patent issued by the United States to Thomas Horne on the 9th day of July, 1823; and the defendant under a homestead entry made on the 23rd day of April, 1887, which entry was merged into a patent during the progress of the suit in the court below.

The undisputed facts as to the issue of the two patents are as follows:

On the 12th of October, 1821, Thomas Horne entered and paid for, at the local land office at Tuscaloosa, Alabama, the land in controversy; and received therefor, a certificate and receipt in the usual form, which is set out in the record. It appears, from a series of letters, certificates and affidavits (R. p. 35-43), that the said Horne afterwards applied to have this money returned, or applied to some other tract, alleging as a reason, a mistake on his part, of the numbers of the land embraced in his entry. Authority was given by the Secretary of the Treasury in the manner shown by the record, April 23rd, 1823, to *withdraw* said entry, and to apply the money thereon paid to the purchase of any other lands in the district.

It is then shown in the evidence that Horne did enter three other tracts of land; and that the receiver of the Tuscaloosa office took credit for the amount of money originally paid by Horne.

The record shows that the *entry* of Horne for this land was *not* cancelled, and that patent issued upon it regularly on the 9th day of July, 1823. Patents were also issued in 1824, for the three other tracts entered by Horne. It therefore appears that while he entered and received patents for four tracts of land, that he actually paid for only the land sued for in this action, and paid, in part, for the other tracts.

In July, 1825, two years after the issue of the first patent to Horne, the land office discovered their mistake in issuing a patent to Horne for the lands included in his second entry, in part, for the purchase money paid on the first entry, and in allowing both entries to go to patent; and the Register at Tuscaloosa was afterward instructed, by letter of commissioner, to call on Horne for a relinquishment of title to the government of the land in controversy (R. p. 35-36).

The Register answered three months thereafter, that

Horne had removed to Tennessee and that he, the Register, was unable to ascertain his whereabouts, or reach him by letter, and that he had cancelled the patent and would return it enclosed. He failed, however, to cancel *the record of the entry in his office*, as is shown in the evidence (R. p. 31.)

The entry upon which this patent is based was not cancelled until after patent was issued upon it; not until after the defendant had filed his claim to the land as a homesteader, and the *record* of the entry in the local office remained intact (R. p. 31) until April 23rd, 1887. It stood for more than sixty-five years, as a record, and as conclusive evidence of Thomas Horne's title to the land.

The land had, in that time, been in the consecutive possession of, and was held by sixteen different claimants, under deeds of warranty, quit claim, and under the laws of descent, before it was purchased, under warranty deed, by by plaintiff, the East Lake Land Co. (R. p. 30). The deraignment of title, however, from Thomas Horne was not admitted as evidence by the court,—plaintiff offering evidence tending to prove the existence of a deed from Horne, and its destruction by fire during the civil war, which the court excluded.

The plaintiff remained in possession of this land until about April, 1887, when defendant, I. C. Brown (possibly a clerk in government employ), discovered this state of things, and made entry of the same on April 23rd, 1887, *three days* prior to the cancellation of the record of Horne's entry, as ordered by the Commissioner, which record had stood since 1821.

In other words, it appears from the record that the defendant, in order to appropriate this valuable discovery to his own account, filed his application to enter said land, in the local office, three days prior to the date of the Com-

missioner's letter ordering the cancellation of the record of Horne's entry.

The record of the proceedings on the trial in the court below contains the remaining points in this case, and are as follows:

The defendant first interposed special plea of *res-adjudicata*, alleging defendant's entry of land in April, 1887; a petition of plaintiff to the Commissioner of the Land Office, in November following, praying for the cancellation of defendant's entry, and alleging that the Commissioner is a court of competent jurisdiction to hear and determine the issues presented; that the Commissioner's decision was adverse to plaintiff, and that therefore the said adjudication is an answer and a bar to plaintiff's suit.

The plaintiff demurred to this plea; the causes are fully set out in the record. No proof was offered to sustain this plea.

In the next special plea—*puis dar-ein* continuance—the defendant pleads that during progress of this case, the Secretary of the Interior had also decided the case, before him on appeal, sustaining decision of Commissioner, and adverse to plaintiff's claim. No proof was offered to support this plea.

In the next special plea—*puis dar-ein* continuance—defendant further pleads that during the progress of the trial, defendant had obtained a patent from the government for said lands, and that said patent had been *accepted* by him, completing his full title to the land.

The defendant then, in a rejoiner to the replication of plaintiff, sets fourth the evidence above contained in this statement, showing the application of Horne for a change of entry; the alleged cancellation of Horne's entry (which is disproven by the record produced in evidence before the Court, see pages 25 and 31)., and the cancellation of Horne's patent.

Plaintiff demurred to this rejoiner of defendant (endorsed rejoiner No. 1, R. p. 17) to the replication of plaintiff, and assigns as the principal cause that the facts alleged in defendant's rejoiner showed that the patent issued to Thomas Horne was based upon a subsisting entry, which authorized the issuance of same.

The court overruled this demurrer to the rejoiner to the plaintiff's replication, and the cause then proceeded to trial by jury, which had been demanded by defendant.

All the evidence being set out in the record, the plaintiff asked the court to give to the jury the following charge, in writing: "If you believe the evidence in this case you must find the issues in favor of the plaintiff."

The court refused to give this charge.

The defendant then asked the court to give the following charge, in writing: "If you believe the evidence in this cause you must find the issues in favor of defendant." The court gave this charge, to which the plaintiff excepted. A verdict and judgment was then rendered in favor of defendant.

ASSIGNMENT OF ERRORS.

The Circuit Court erred, as is manifest by the record.

1. In overruling plaintiff's demurrer to the rejoiner of defendant to plaintiff's replication, and the several demurrers to the special pleas of the defendant.

2. In admitting as evidence that part of the record of proceedings in the General Land Office, made subsequent to the issue of Horne's patent, to impeach the validity of the same.

3. In admitting as evidence the record of the proceedings of the General Land Office showing the entry and patent of defendant for land, the fee to which had passed out of the United States by a patent to Horne.

4. In excluding the testimony of James Eastis and of B. F. Barton, to which refusals exception was taken, as shown by the record on pages 28 and 29.

5. In refusing to instruct the jury, as requested by plaintiff, as follows, to-wit: "If you believe the evidence in this case you must find the issues in favor of the plaintiff."

6. In instructing the jury, as requested by defendant, as follows, to-wit: "If you believe the evidence in this cause you must find the issues in favor of defendant."

ARGUMENT.

1. The department of the Government, having authority to dispose of the public domain, has conferred upon it by law *quasi* judicial functions which it must of necessity exercise in settling questions that arise between individuals for land, the title to which is, at the time, vested in the Government, and in deciding, *ex parte*, questions of error on the part of its officers arising in the department, in the course of the proper disposition of the public lands under the law, but there its judicial powers end.

2. What power the Interior Department has to dispose of the public lands, is derived from acts of Congress, under the Constitution, and it can have no jurisdiction which is not so expressly conferred. No party to a proceeding before the department could, by his own volition or consent, confer any powers upon the Commissioner of Public Lands which he did not already have under the law. This court has repeatedly held that the issue of a patent for public lands is a ministerial act, conclusive in its nature, which must be performed according to law; and also that no ministerial officer has the right to review such acts of his predecessor.

In the case of United States *vs.* Stone (2 Wallace, 525), Mr. Justice Grier, delivering the opinion of the court, said:

"One officer of the Land Office is not competent to cancel or annull the act of his predecessor. That is a judicial act and requires the judgment of a court."

3. The facts stated in the plea of *res adjudicata* and the correct action to be taken in the further progress of this case seem to make it proper to consider the secretary's decision, as to the cancellation of Horne's patent, which is published as an authority in 9 Land ~~Divisions~~, 322. His decision seems to be based upon a single authority, (Leroy *vs.* Jamison, 3, Sawyer 369) and upon two sentences only of a paragraph of the opinion of the court. The secretary placed a wrong construction upon the meaning and intention of the court; and further, in applying it to the case under consideration, he misconceived the facts in the record as the transcript of the record of that office, found in the record of this case before the court, shows.

The secretary quotes: "In order therefore, that the patent of the government, like the deed of a private person, may take effect as a conveyance so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted." Further he quotes: "Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue, his refusal to accept it is explicitly declared and such refusal is communicated to the land office." The secretary then says: "In the case now under consideration the grantee refused to accept the patent, and that refusal was communicated by him to the proper officers." The record fails to support this statement.

It will be seen in the statement of the case by the court, in Leroy *vs.* Jamison, that the commissioner issued a patent to an individual; sent it for delivery to the local office. The grantee expressly refused to accept it, as it did not cover, fully, the land he claimed; it was returned and cancelled by

a succeeding commissioner; a new survey was ordered and another patent issued covering a larger area of land. Subsequently this second patent was cancelled, upon a review of the case, and a third patent issued for the land conveyed in the first. The Secretary of the Interior, on appeal, revoked the cancellation of the second patent, as he stated, for the purpose of allowing claimant to come into court, and *not for the purpose of revoking or altering the decision made*.

This was a case of *two* patents issued to the *same* party, the second containing a larger tract than the first. The court in reviewing the evidence, said: "The endorsements on the copy produced show a revocation by the secretary, of the cancellation directed by the commissioner; and if titles can be affected in this irregular way, can be divested and re-invested by indorsements of the officers of the land office upon its records, the revocation is of equal validity with the cancellation."

The title to that part of the tract not embraced in the first patent was still vested in the government, so that the *second* patent conveyed a *second* time to the *same* party the land embraced in the first, together with the remainder of the tract, the title to which was still in the government. This remaining land, as the court suggested, might have been conveyed to the party by another patent.

The gist of the opinion is found in this: The Court said: "No one can be compelled by the government any more than by an individual, to become a purchaser, or even to take a gift. No one can have property with its burdens or advantages thrust upon him without his assent. In order, therefore, that the patent of the government, like the deed of a private person, may take effect as a conveyance, *so as to bind the party to whom it is executed*, and transfer the title to him, it is essential that it should be accepted." Again, in answer to the question, when is the

conveyance in a condition to be accepted by the grantee? the court says: "If the instrument be the deed of the government, that is, its patent, it is in that condition when the last formalities required by law, of the officers of the government, are complied with." Then the court apparently apprehending a *possible* misconstruction by some one, proceeds to state what are these last formalities, to-wit: "These formalities consist in passing the instrument under the seal of the United States, and in recording it in the records of the land office." By these acts, open and public declaration is made that, so far as the general government is concerned, the title of the premises has been transferred to the grantee. "The record stands in the place of the offer for delivery in the case of a private deed."

The secretary misconceives the record of the facts in the case before him, when he says: "In the case now under consideration the grantee refused to accept the patent, and that refusal was communicated by him to the proper officers." In the record in this case (R. p. 36), and in the evidence offered by *defendant*, will be found a certified copy of a letter from the register of the proper land office to which the patent was sent for delivery, stating that Horne, the grantee, had removed to Tennessee, and that he had been unable to ascertain his whereabouts, or to communicate with him by letter; and that he therefore returns the patent, after cancelling it, to the commissioner. Nothing appears in the entire record to impeach or qualify this statement.

The authority upon which the secretary rests his decision in respect to Horne's patent, is all that the plaintiff could ask or need to sustain its position before this court. And in the light of the evidence in the record of this case, upon which the secretary's decision was founded, it should be treated as a nullity even if the fact were conceded that he

had the right to adjudicate and finally settle the case.

4. Can a patent be impeached, annulled and set aside upon a record in the General Land Office, all of which was made subsequent to its issuance? 2. Is the record of the proceedings of the land office, showing an entry and patent, to land, the title to which has passed out of the government, competent evidence to be considered in an action where the legal title must prevail? 3. Was the court in error in refusing to instruct for plaintiff? 4. Was the court in error in instructing for defendant?

These points are embraced in the one general question; is a patent for land, regular on its face, conclusive as against the government, and all holding under junior patents, until it is annulled by a court of competent jurisdiction, in a proceeding brought for that purpose?

There is nothing in the record to show that the patent to Horne was not regular on its face; in fact the record does show that it was a perfect instrument and legally issued. Such a patent is unimpeachable, and the authorities in the Federal Courts are uniform and abundant in sustaining this position.

The question has been suggested in the opinions of this court, and there may be some doubt, as to whether a patent, void upon its face, would stand in a collateral proceeding. But where it is legally issued, based upon a subsisting entry, signed, sealed, countersigned and recorded, the conclusive ministerial act, in its issue, has been perfected and title passes.

Smelting Co. *v.* Kemp, 104 U. S. 636.
Stringer *v.* Lessee of Young, 3, Peters 340.
Warren *v.* Van Brunt, 19 Wall 646.
Stone *v.* U. S., 2 Wall, 525.
Hooper *v.* Scheimer, 23 Howard, 235.

Delivery of a patent is not essential to pass title.

In the case of the United State *v.* Schurz (102 U. S. 378), being a petition for a mandamus to compel the Secretary of the Interior to surrender a patent; Mr. Justice Miller delivering the opinion of the court, said: "We are of the opinion that when upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent made out in that office is signed by the President, sealed with the seal of the General Land Office, countersigned by the recorder of the Land Office, and duly recorded in the record-book kept for that purpose; it becomes a solemn public act of the Government of the United States and needs no further delivery or other authentication to make it perfect and valid. In such case the title to the land conveyed passes by matter of record to the grantee, and the delivery which is required when a deed is made by a private individual is not necessary to give effect to the granting clause of the instrument. The authorities on this subject are numerous and uniform. They have their origin in the decisions of the English Courts upon the grants of the Crown evidenced by instruments called there, as here, patents."

He further says: "From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases." And again he says: "The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title-deeds destroys his title."

In the case of Smelting Co. *v.* Kemp (104 U. S. 635), Mr. Justice Field delivering the opinion of the court, said: "The execution and the record of the patent are the final

acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces." See also,

Warren *v.* Van Brunt 19 Wall 646.
Moore *v.* Robinson, 96 U. S. 530.
Brickell *v.* Comstock, 113 U. S. 149.

The plaintiff in this action does not rely upon the weakness of defendant's title, but upon the broad ground that the patent—a senior patent—is the highest evidence of title and must prevail in an action of trespass to recover the land, or on action of ejectment.

The authorities are so numerous in the federal courts, sustaining this position and there are so few that can be construed against this uniformity, that it hardly appears necessary to refer to state authorities, which are equally emphatic in maintaining this position.

5. Statutes of limitation and rules of prescription, based on the holding of lands adversely to the government, do not interrupt its titles. But, where the title has passed out of the government, by formal patent, even under circumstances of fraud, or by the mistake of its officers, and the patentee and others under him hold under such patent, a third person cannot invoke this rule to enable him to support a subse-

quent conveyance by the government, after the lapse of 20 years from the first conveyance.

A direct proceeding, in a chancery court, to vacate and annul the first patent, would not be maintained against persons holding, in good faith under a patent that is voidable, that was issued more than 20 years before it was instituted. The equity of the rule of prescription would operate upon the subsequent claimant and prevent him and the officers of the law from creating a title in him by making or amending a public record that had stood unimpeached for more than 20 years. The cases of Mehan *v.* Forsythe, and Bryan *v.* Forsythe, 19 How., 334, 24 How., 175, seem to be authorities on this point, that are conclusive. See also,

Brown *v.* Chiles 10 Pet., 177.
Bowman *v.* Wathen 1 How., 189.
Piatt *v.* Vattier 9 Pet., 405.
Langdeau *v.* Hanes 21 Wall, 521.
Harpending *v.* Reformed Dutch Church, 16 Peters, 455.

The following cases show that the plaintiff was entitled, on the common law rule of prescription, to the charge that it was entitled to recover the land sued for, which the court refused :

Bryan *v.* Forsythe 19 How., 334.
Mehan *v.* Forsythe 24 How., 175.
Alexander *v.* Pendleton 8 Cranch, 462.
Piatt *v.* Vattier (supra).
Ewing *v* Burnet 11 Peters, 41.

JNO. T. MORGAN,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
MAR 29 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

THE EAST LAKE LAND COMPANY, a corporation, PLAINTIFF IN ERROR,

vs.

ISAIAH C. BROWN.

FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

SUIT IN EJECTMENT, INVOLVING THE NORTH HALF OF THE SOUTHWEST QUARTER OF SECTION 14, TOWNSHIP 17 SOUTH, RANGE 2 WEST, IN JEFFERSON COUNTY, STATE OF ALABAMA.

BRIEF FOR DEFENDANT.

D. P. BESTOR,
Counsel for I. C. Brown.

Graham & Dellinger, Printers and Binders, Mobile, Ala.

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BRIEF FOR ISAIAH C. BROWN, THE DEFENDANT.

STATEMENT OF FACTS IN THE CASE.

Thomas Horne made a private cash entry of this quarter section, No. 884, the north half of which is involved in this suit, on the 12th day of October, 1821. (Record, page 25.)

About one month thereafter, to-wit, on the 10th of November, 1821, Horne made an affidavit before Hume R. Field, setting forth, under oath, that he had made a mistake in the des-

cription of the land he desired to enter, in naming the section, he having named section *14*, when his purpose was to name section *17*; Horne had thus by mistake entered southwest quarter of section *14*, township 17 south, range 2 west, when his desire was to enter southwest quarter of section *17* south, range 2 west, and this "mistake was produced by some person altering and changing the mark or figure from 17 to 14 at the corner." (Record, pages 37, 38.)

On 22d November, 1821, a little over one month from the making by Horne of this affidavit, and request of change of section 14 to 17, the land officers at Tuscaloosa forwarded said affidavit to the Commissioner of the General Land Office in Washington, stating and informing the Commissioner that Thomas Horne desired "to transfer the payment made on the tract entered to some other tract" of land, but that in their opinion the local land officers did not have the power or authority to make such desired change. (Record, page 38.)

On January 2d, 1822, one month and eleven days thereafter, the Commissioner of the General Land Office sent a communication to the local land officers asking their opinion on the merits of Horne's said request and stating that the mistake arose from the *alteration* of the surveyor's mark at the corner of the section. (Record, page 39.)

On the 19th of March, 1822, two months and nineteen days after said communication from the Commissioner of the General Land Office was sent to the local Receiver at Tuscaloosa as above stated, said Receiver addressed a communication in answer thereto to the Commissioner of the General Land Office stating that he was "*decidedly of the opinion that the mistake made by* Thomas Horne and others in their entries of land should be rectified, and the amount refunded or applied to the purchase of some other tract," and this letter from the Receiver has this endorsement on it from the General Land Office at Washington, under date of April 27th, 1822,—"Respectfully

submitted to the Secretary of the Treasury whether the *mistake* of T. Horne, in entering a tract different from what he *intended* owing to the *change* of the marks in the corners from 17 to 14, may not be rectified." (Record page 40.)

On May 8th, 1822, about two months after said communication from the Receiver above mentioned, the Commissioner of the General Land Office returned Horne's affidavit to the local officers and required the Register and Receiver to report to him their opinion and further stating that the affidavit of Horne must be corroborated by the testimony of one or more disinterested persons. (Record, page 41.)

On the 23d day of April, 1823, the Secretary of the Treasury sent to the Register and Receiver at Tuscaloosa, a copy of his decision and order of April 18th, 1823, with instructions and authority to permit the *withdrawal* of Horne's entry and to allow the payment to be applied to other lands as requested by Horne. (Record, page 41, 42.)

After all these regular proceedings and careful and lengthy inquiries, and after the *consent* of Horne and after his petition for other lands, and after the orders from the Secretary of the Treasury, and the Commissioner of the General Land Office to permit Horne to withdraw his entry made by *mistake*, which the Act of Congress allowed him to do, and make such entry as he desired, and after Horne's continuous efforts to correct his mistake and get the lands he really wanted and not the lands he had entered by mistake as above explained; by error the Patent was issued on the 9th day of July, 1823, and sent to the Register of the Land Office at Tuscaloosa for Thomas Horne on the *21st day of August, 1823;* (Record, p. 42) but was never delivered to or *accepted* by him, but on the contrary on the *1st day of August, 1823*, and before this Patent left Washington, Horne's money thus paid by him for wrong land was applied on the same day to the entry of other lands, to-wit, east half of southwest quarter of section 29, township 18, range 6, and east half of southwest quarter of section 2, township 20, range 4,

159 acres, (Record, page 43;) and the Patent which had thus been isssued was returned to Washington on 26th day of October, 1825, and cancelled (Record, pages 36, 33,) and the Receiver at Tuscaloosa was afterwards allowed a credit for such money so refunded to Horne by the United States Treasurer. See letter of Commissioner of Land Office, under date of 29th of April, 1833. Record, page 43.)

The plaintiff in error derived title through Jemison and Vanhose by deed dated July 8th, 1886 (Record, page 30,) and through parties who held under tax title from the State, under sales made in 1862, as the property of Horne, and from occupancy previous to that date shown by parol evidence.

(Record, pages 27-30.)

Isaiah C. Brown made his homestead entry of this quarter section No. 19,700, the north half of which is involved in this suit, on April 23d, 1887, at Montgomery, Alabama; built a house on the land and moved into it with his family as his homestead on May 28th, 1887, and made other improvements required by law, and has lived there ever since and still lives on said lands as his homestead.

Brown followed up this entry by proper acts and payments until he received a Patent from the Government for the land on the 8th day of March, 1890, which Patent he still holds.

(Record, page 44.)

The above statement embraces substantially all the facts in the case.

The question, then, for determination is whether the East Lake Land Company, which holds under tax titles part of the proporty sold as Horne's and another part by occupation; or Isaiah C. Brown who holds directly under a Patent from the Government, has the legal title to this north half of southwest quarter of section 14, township 17, range 2 west; and this further raises another questiou, viz: whether or not the Government had a right to cancel the Patent made out to Horne by

mistake, and improvidently sent to him after he had received back his money, and after he had refused to take the land or to accept the Patent.

ARGUMENT.

It is a very significant fact in this matter that the Commissioner of the General Land Office has twice decided, and the Secretary of the Interior has on appeal decided that the East Lake Land Company had no title, and that when Brown made his entry the tract of land so entered by him was vacant and legally subject to entry as vacant government land. See opinion of Mr. S. M. Stockslager, General Land Commissioner, dated April 7th, 1888, and opinion of the First Assistant Secretary of the Interior, August 29, 1889, made an appendix to this brief. And this Court takes judicial notice of the facts recited in the records of the Department of the Interior.

Knight vs. U. S. Land Association, 142 U. S., 161.

And while the decisions of the land department on matters of law are not binding on this Court, they are entitled to great respect.

Hastings Railroad Co. vs. Whitney, 132 U. S., 357.

The decisions of the officers on the facts are conclusive.

Bell vs. Hearne, 19th Howard, 252.
Johnson vs. Towsley, 13 Wallace, 72.
Moore vs. Robins, 96 U. S., 530.
Smelting Co. vs. Kent, 104 U. S., 636 (640.)
Steele vs. Smelting Co., 106 U. S., 447.
Phillips vs. Sherman, 36 Alabama, 193, 194.
Chandler vs. Hecla Mining Co., 149 U. S., 79.

In a court of law the land officer's decision is final. Only in a court of equity can it be set aside.

Knight vs. U. S. Land Association, 142 U. S., 163.
Johnson vs. Towsley, 13 Wallace, 72.

There are two ways to cancel and set aside a Patent, viz:

First, by consent.

Second, when it has been inadvertently issued or a mistake has occurred, and the record does not show that it was issued according to law.

Horne comes under both of these heads in having this Patent issued to him cancelled.

The consent of Horne and the acceptance of the Patent which were an are and absolute *sine que non* of the passage of title to the grantee by the Government, were not only not given by Horne, either actually or constructively, but soon after he paid his money, to-wit, on the 10th of November, 1821 (Record, pages 37, 38) he petitioned the government not to issue the Patent, but to change his entry, as it had been a mistake on his part, and he followed this application up until he did get his money back, to-wit, on the 1st day of August, 1823, (Record, page 43) and entered other lands with it. Horne did not want a Patent for this land, he never had one delivered to him, and he never accepted one, but from the beginning to the end he repudiated this entry, and asked that it be changed. Hence this quarter section of land never did belong to Horne but still remained the land of the United States.

Levy vs. Jamison, 3 Sawyer, 369.
Phillips vs. Sherman, 36 Ala. (bottom page,) 194.
Moore vs. Robins, 96 U. S., 530, 531, 532, 535.
Central Branch Union Pacific R. R. Co. vs. Kansas Pacific Railroad Co., 2d volume Copp's Public Land Laws 1882, page 774.
Maguire vs. Tyler, 8 Wallace, 650, 664.
Maguire vs. Tyler, 1st Black (U. S.) 195, 199, 202.
Doswell vs. De la Lanza, 20 Howard, 29.
Wm. H. McLarty case, 4 vol. Land Decisions, 498.
Bell vs. Hearne, 19 Howard, 252, 260, 262.
U. S. Statutes at Large, section 2369, in force March 3d, 1819, page 434.

After the entry was withdrawn and consented to by the land office and thus cancelled, there was nothing to act upon in issuing the patent.

Bates vs. Herron, 35th Alabama, 117.

Then see letter dated July 25th, 1825. (Record, pages 35; 36.) This relinquishment was not required until May 24th, 1828. See U. S. Statutes at Large, section 2370.

SECOND.

But the East Lake Land Company relies upon the decisions of the Supreme Court in the causes of

Bricknell vs. Comstock, 113 U. S., 149,

U. S. vs. Schurz, 102 U. S., 378,

and it contends that as the Patent was actually issued to Horne, the title passed out of the United States to him, and the United States' officials had no further power over the land in any way, and hence no authority to cancel the Patent.

This position would be correct had the Patent been issued on the application of Horne and then withdrawn without the *consent*, or against the protest of the grantee; but such are not the facts in the cause at bar, but on the contrary Horne *consented* to the withdrawal and change of the entry, applied for its change, received the money back, entered other government lands on the same day and refused the Patent. (Record, pages 38 to 43.) In fact he could not have received it if he had demanded it, after it was issued. He parted with his interest when he received back his money.

McGuire vs. Tyler, 8 Wallace, 663.
W. A. Simmons, 7 L. D., 283.

In Bricknell vs. Comstock, supra, the Court use this language: "In June, 1878, the Commissioner of the General Land Office ordered a return of this Patent to his office and thereupon tore off the seals and erased the President's name from said Patent, and mutilated the record thereof in the General Land Office, *all without the consent and against the protest of the grantees of* said Bricknell."

113th U. S., page 151.

In United States vs. Schurz, supra, the Court say, "it is also said that there was no acceptance of this Patent by the grantee, and for that reason it is ineffectual to convey title. It

is not necessary to enter into much discussion on this subject, because the *acceptance* of a deed may be *presumed* under circumstances far short of what was admitted to exist in this case. The doctrine on this point is well stated by Attorney General Crittenden in the cause of Pierre Mulette in 1841 * * * * in regard to the duty of the Secretary to deliver the Patent then lying in the office. My opinion, said he, is that the title to the land did pass to Pierre Mulette at the date of the Patent to him, although that Patent still remains in the Land Office without any actual tradition of it to any one. The Patent was issued by authority and direction of law, and upon general principles where the *Patentee does not expressly dissent, his assent and acceptance are to be presumed from the beneficial nature of the grant*," &c.

102 United States, 399, 400.

And in a communication from Secretary Schurz to the Commissioner of the General Land Office, of February 28th, 1881, in regard to his duty under the rulings of the United States Supreme Court in McBride vs. Secretary of the Interior, Mr. Schurz gives said opinion its full force and effect in regard to the *delivery* of patents when once issued, and instructs the Commissioner as to the endorsement he must make on certain patents in accordance with the decision of the United States Supreme Court in said cause of McBride vs. Schurz; yet he further says:

"This endorsement should not be made upon any Patent surrendered up to be *cancelled by consent* of the grantee, or the *acceptance of which has been refused*, nor upon a cancellation by order of a court of competent jurisdiction, nor upon a patent vacated for the mere purpose of correcting a clerical error, or for other like cause, such cases being excepted out by the reasoning of the Court from the general doctrine of the decision."

See Copp's Public Land Laws, 1882, vol. 1, 330.

It will thus be seen that these two causes recognize the principle that if the Patentee does expressly dissent from receiving the Patent and refuses to receive it or *consents* that it may be changed or cancelled, then no one can complain and the Commissioner of the General Land Office and certainly the Secretary of the Interior, have the power to correct, change or cancel the Patent.

Horne dissented from receiving this land long before the Patent was issued and refused to receive the Patent, but received his money back and otherwise applied it as hereinbefore stated.

But this point has been expressly passed upon by the Supreme Court of the United States. In the cause of Maguire vs. Tyler, 8th Wallace, 650, the Court there say:

"None of the representatives of the donee ever asked for that survey, nor ever *consented to receive* the Patent, and on the 4th of February, 1858, the Secretary of the Interior *recalled* it and it was promptly returned as having been improvidently issued. Justice and truth were both subserved in the course pursued as the Patent gave no title to any land whatever to the patentee, because the location was upon an elder concession. *Doubt as to the power of the Secretary to recall the Patent cannot be entertained*, as the point has been directly decided by this Court. Brazeau's representatives, say this court, case of Maguire vs. Tyler et al., refused to accept the Patent for the sixteen arpents and caused it to be recalled and his claim therefore stands before the court as it existed in 1810, when the Board of Commissioners confirmed it as valid."

McGuire vs. Tyler, 8th Wallace, 664.
36th Alabama, 192-194.
19th Howard, 252.

And so also does the southwest quarter of section 14, township 17, range 2 west, stand as it existed in 1821 before Horne made a mistake in applying to have it entered. In other words, said quarter section still stood as public lands when Brown made his entry.

THIRD.

If the above views are correct, then the land was public land and subject to Homestead Entry and Brown's entry and patent afterwards acquired make his title unassailable, and no claim of a squatter, or under a tax title, or by any sale or statute of limitation or stale demand could the United States be deprived of its title, and the plaintiffs and their vendors are, and have been mere trespassers on United States lands.

Redfield vs. Parks, 132 U. S., 239.
Drew vs. Valentine, 18th Fed. Reporter, 712.
U. S. vs. Dalles Military Road Co.
140 U. S., 599, 632.

Can plaintiffs hold any better title than Horne had? Could Horne hold under this Patent, improvidently issued, against his *consent* and contrary to his wishes for which the United States have received no pay from him, but on the contrary had paid him back his entry money? The *intent* of both contracting parties was that this land should not be Horne's.

Tax deeds are only evidence when the party relying upon them shows that all the provisions of the law antecedent to and authorizing the sale have been substantially complied with. No presumptions can be raised to cure substantial defects. Certainly in regard to tax sales made prior to January 12th, 1879.

Carroll vs. Safford, 3 Howard, 462.
Childress vs. Calloway, 76 Alabama, 128.
1 Brickell's Digest, 547, sec. 258, 259.

The records of the land department in Washington showed the title to these lands, and said records showed that Horne, and hence those holding under him, had no title.

The general charge was given by the Court in favor of the defendant. The case presented a question of law, to-wit: whether or not under the facts as shown, the United States government had a right to recall and cancel the patent issued in the name of Horne. The lower court was of opinion that it did, and if so, it necessarily followed that the title to this quarter section had never passed out of the Government at the time Brown made his entry.

If this view of the law by the Court is correct, and we feel confident that it is, then if any error was committed in the rulings of the court below on any of the particular points of evidence (which we cannot detect,) then it was error without injury, and we omit the discussion of such special points.

We confidently rely upon the affirmation of the judgment.

D. P. BESTOR,

Councel for I. C. Brown.

APPENDIX.

Copy. DEPARTMENT OF THE INTERIOR. W. O. C.

"C." General Land Office,

Washington, D. C., April 7, 1888.

L. Harrison, Esq.,

Washington, D. C.

Sir: I have considered your request for a review and reversal of my decision announced in my letter to you of the 19th December last, denying your motion that the homestead entry of Isaiah C. Brown, for the S. W. ¼ of section 14, township 17 S., of range 2 W., Montgomery, Alabama, No. 19,700, should be canceled.

It appears that said tract was entered by Thomas Horne, on the 12th October, 1821, as per Tuscaloosa cash entry No. 884, that Mr. Horne applied for a change of entry on or about the 22d November, 1821, alleging that the entry so made by him was erroneous in description; that his application was granted, on the 23d of April, 1823; that on the 1st August, 1823, he receipted to the Receiver for the purchase money paid on said entry, and at the same time made entry of two other tracts, containing together about the same area, viz: The E. ½ of S. W. ¼ of sec. 2, township 20 S., of range 4 W., and E. ½ of S. W. ¼ of section 27, township 18 S., of range 6 W., as per Tuscaloosa entries No. 3594 and 3595, patented May 27, 1824; and that the Receiver was duly credited, in his accounts, with the money, as receipted for by Horne.

It further appears that after Horne applied for change of entry, and after the change was allowed, as aforesaid, a patent was inadvertantly issued for the entry as originally made, patent dated the 9th July, 1823, which patent was afterwards canceled.

I am of the opinion that the allowance of Horne's application for a change of entry was equivalent to a decision of record that no patent should be issued, and the patent issued under such circumstances was void and of no effect. See case of William H. McLarty, 4 L. D., 498. That Horne did not formally relinquish, if true, is immaterial.

I am, therefore, of the opinion that when Brown made his said entry, the tract was vacant, and legally subject thereto, and my conclusion as announced in letter to you of 19th Dec.

last, refusing to cancel the same, for conflict with Horne's entry No. 884, and the patent issued therefor, is accordingly adhered to. That letter is herewith enclosed.

Respectfully,

S. M. STOCKSLAGER,
Commissioner.

DEPARTMENT OF THE INTERIOR.

Vol. 10, 429. Washington, August 29, 1889.

The East Lake Land Company et. al
vs.
Isaiah C. Brown.

The Commissioner of the General Land Office:

Sir—I have considered the appeal of the East Lake Land Company et. al from the decision of your office, dated April 7, 1888, adhering to a former decision sustaining the homestead entry No. 19,700 of Isaiah C. Brown for the S. W. ¼ sec. 14, t. 17 S, r. 2 W., Montgomery land district, Alabama.

The record shows that on April 23, 1887, Isaiah C. Brown made homestead entry for said described tract and on November 29, same year, the East Lake Land Company et. al. filed a petition protesting against the allowance of said entry, alleging therein "that they are the owners and occupants of said tract; * * * that their titles * * * are derived through various mesne conveyances from one Thomas Horne, who made private cash entry * * * covering said tract which said entry was patented * * * July 9, 1823; * * * that your petitioners and their grantors have been in peaceable * * * possession of said S. W. ¼ * * * until the present year, when one Isaiah C. Brown, in fraud of petitioners' rights and for speculative purposes * * * did make homestead entry covering said land." They further alleged that the said patent was never legally cancelled; that taxes were levied and collected thereon and that their titles rested upon deeds from said Horne and from the Sheriff of Jefferson County, Alabama.

On December 16, 1887, Brown filed an answer to said petition, and on December 19, 1887, your office decided in favor of Brown's homestead entry.

On February 4, 1888, the attorney for said petitioners requested a review of the case, and on April 7, same year, your office again decided in favor of Brown's entry.

On June 4, 1888, the East Lake Land Company et. al. appealed to this department and the case is now before me.

The records in your office show that on October 12, 1821, Thomas Horne made private cash entry No. 884 (Tuscaloosa Series) for the same tract that is now in controversy, containing 161.10 acres, and paid therefor the sum of $201.38, and about one month thereafter he executed an affidavit, of which the following is a copy, viz:

"State of Alabama, } ss
Tuscaloosa County. }

This day Thomas Horne appeared before me, Hume R. Field, judge of the county court of Tuscaloosa, and deposed upon the holy evangelists of Almighty God, that he came to the town of Tuscaloosa for the purpose of entering with the register of the land office a quarter section of land which was offered and not sold, and which is designated as follows: Range 2 west, township 17, section 17, southwest quarter; but that instead thereof he entered the southwest quarter section 14, in the same range and township; that this *mistake* was produced by some person altering and changing the mark or figure from 17 to 14 at the corner.

Given under my hand and seal this 10th day of November, An. Dom. 1821. (Signed) His
Thomas × Horne,
mark

HUME R. FIELD, (Seal)

Judge of the County, Tuscaloosa."

The signature of the judge to said affidavit was duly authenticated by the certificate of the clerk of the county court of said county, and bears date November 10, 1821.

Horne filed said affidavit in the local land office at the same time requesting that patent should not be issued to him for the tract then covered by said entry, but that he be permitted to change his said entry so as to cover the land intended by him.

The register and receiver transmitted Horne's application to your office accompanied by the following statement, viz:

Land Office, Tuscaloosa, 22 November '82 (22 Nov., 21.)

Enclosed you will receive the affidavit of Thomas Horne setting forth that he has made a mistake in entry of a certain half quarter section of land therein mentioned; as it is conceived that we do not possess the power to remedy such cases we have thought it proper to submit it to your department.

The desire of Mr. Horne is to transfer the payment made on the tract entered to some other tract.

Very respectfully, we are your obt. servants,

WILLIAM G. PARISH,

JOHN McKEE."

In reply your office informed the local officers as follows:

"2nd of January, 1822.

"To the Register and to the Receiver of the Land Office at Tuscaloosa:

"Sirs—It appears from the affidavit of Thomas Horne, enclosed in your letter of the 22nd of November last, that the mistake arose from the alteration of the surveyor's marks at the corner of the sections. Before a decision can be made in the case by the Secretary of the Treasury, agreeably to law, you will be pleased to give a decided opinion on its merits."

On March 19, 1822, the receiver addressed a letter to your office stating: "I am decidedly of the opinion that that mistake made by Thomas Horne and others in their entries of land should be rectified, and the amount refunded or applied to the purchase of some other tract. These men, I am credibly informed, are in extreme indigent circumstances and quite illiterate. I hope my opinion of their cases will meet with your concurrence."

On May 8, 1822, the commissioner in a letter to the register at Tuscaloosa stated: "I return the affidavit of Thomas Horne and agreeably to direction from the Secretary of the Treasury have to advise you that the act of March 19, 1819, requires the register and receiver both to report their opinion on cases coming within its provisions with the testimony in relation thereto; the affidavit of the party as to changes of the mark or figure at the corner of the tract is to be corroborated by the testimony of some one or more disinterested persons. I would refer you to the act itself, and request that in future the cases which the register and yourself may have reported under it will be reported directly to the Secretary of the Treasury."

On April 18, 1823, the Secretary of the Treasury addressed a letter to the commissioner of the General Land office, in which, among other things, he stated: "It also appears by the report of aforesaid and by other testimony, that Thomas Horne entered by mistake the seventeenth instead of the fourteenth section in township 17, range 2 west. I do, therefore, authorize you by virtue of the power vested in me by

the act of the 3rd of March, 1819, to direct the land officers at Tuscaloosa to permit the said Isaiah Bagley and Thomas Horne to withdraw their entries, made by them as above stated, and to apply the money paid thereof to the purchase of any other public lands in the said district or to the payment of lands already purchased of the United States in the district of Tuscaloosa."

On April 23, 1823, a copy of the foregoing decision and order of the Secretary of the Treasury was transmitted to the register and receiver at Tuscaloosa, with instructions and authority to permit the withdrawal of Horne's said entry, and to allow the payment made to be otherwise applied by Horne.

On July 9, 1823, a patent was issued to Thomas Horne for said tract by mistake, but was never delivered to or accepted by him; but on August 1, 1823, the $201.38 was refunded to him and he thereupon gave to the receiver of said land office his receipt for said money and the patent which had been issued as aforesaid was then and there canceled, and subsequently the receiver was credited by the treasurer of the United States for the money so refunded.

The appellants herein seem to rely upon the decision of the Supreme Court in the case of Bricknell vs. Comstock (113 U. S., 149) and contend that the rule laid down in said cited case should be applied to, and govern the case at bar, and that Brown's entry should therefore be canceled "on the ground of invalidity." I cannot concur in this view as in the case cited, it was shown that Bricknell never asked to have his entry changed, but on the contrary both he and his grantees made valuable improvements on the tract entered by him; and in June, 1878, when your office ordered a return of Bricknell's patent and tore off the seals and erased the president's name from said patent and mutilated the record thereof, all such acts were done without the consent and against the protest of the grantees of said Bricknell.

The record in the case at bar sufficiently shows that Horne fully acquiesced in the cancellation of the patent which was inadvertently issued to him, and there is not any evidence either record or parol to show that Horne ever laid claim to said tract after he applied to have said entry canceled or made any improvements thereon, nor is there any record evidence tending to show that Horne ever offered to sell or convey to any person or persons his interest in said tract of land from the date of entry up to the date of its cancellation nor since.

From abstracts of title filed in this case both by the appellants and appellee, it appears that one Moses Field as Tax col-

lector, conveyed to Daniel Eustis by tax deed on March 22, 1852, the N. E. ¼, S. W. ¼, Sec. 14, T. 17, R. 2, because of "failure of Thomas Horne to pay taxes for the year 1851," this is the only evidence that Horne's name was identified with said tract for a period of twenty-nine years; and in my opinion is not sufficient to overcome the former record in this case, which sufficiently shows that he had parted with his interest in the land when he accepted from the United States officers a return of the purchase price of said tract. McGuire vs. Tyler (8 Wall, 663), W. A. Simmons (7 L. D., 283.)

The question as to the time when a patent from the government becomes effective as a conveyance was considered by the United States Circuit Court in the case of Leroy vs. Jamison (3 Sawyer, 369) and in the decision of that case it was said:

"In order, therefore, that the patent of the government, like the deed of a private person, may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted."

After stating that a patent from the government is in a condition for acceptance by the grantor "when the last formalities required by law of the officers of the government are complied with," it is said: "Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue, his refusal to accept it is explicitly declared and such refusal is communicated to the land office."

In the case now under consideration the grantee refused to accept the patent and that refusal was communicated by him to the proper officers. The essential requirement of acceptance hence never attached to that patent and under the rule laid down in said case of Leroy vs. Jamison, it never became effective to transfer title to Horne.

The appellants in their petition claim to derive title through a conveyance from Horne which they have failed to prove; they also claim title through a tax deed executed in 1852 by the Tax Collector in the name of Horne. In the case of Carroll vs. Safford (3 How., 509,) the U. S. Supreme Court held, "That every purchaser at a tax sale incurs the risk as to the validity of the title he purchases. He incurs the same risk after the emanation of the patent. The sale for taxes is made on the presumption that the purchase from the government has been *bona fide*, and if not so made, the purchaser at the tax sale acquires no title and consequently no embarrassment can arise in the future disposition of the same land by the government."

While to subject land to taxation it makes no difference who holds the legal title when the government is once divested

thereof, yet this rule is not applicable to this case for the reason that the legal title to this particular tract has never passed from the government. A patent does not pass the legal title until delivered and accepted. This patent never having been delivered to Horne, he never had any legal title to the tract in question, hence the plaintiff in this action acquired no interest in this tract by virtue of the tax deed upon which it buttoms its rights.

Upon review of the whole record herein, I am of the opinion that the tract in dispute was public land when Brown made his homestead entry thereon, as the United States could not be deprived of its title thereto by reason of any squatter's claim or claims under the said tax deed; or by any statute of limitation, (Drew vs. Valentine, 18 Fed. Rep. 712) and as there is no evidence in your office that application for entry was ever made for said tract since the cancellation of Horne's entry, until Brown made his entry, I affirm your said decision.

It appears from papers recently filed in this case that while the case was pending undetermined in your office that Brown offered commutation proof and payment for said tract which was accepted by the local officers, and final cash certificate No. 22,687 issued thereon. As this proceeding was contrary to the provisions of Rule 53, of Practice, which declares that "The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioners" said proof and payment was erroneously received and cannot be accepted, and the entryman should be notified to make new advertisement and new proof.

Iddings vs. Burns (on review 8 L. D. 559.)

The papers accompanying your letter of June 13, 1888, are herewith returned.

Very respectfully.

GEO. CHANDLER,

First Assistant Secretary.